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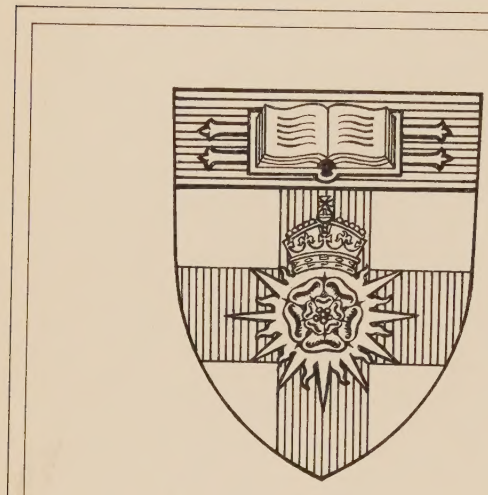

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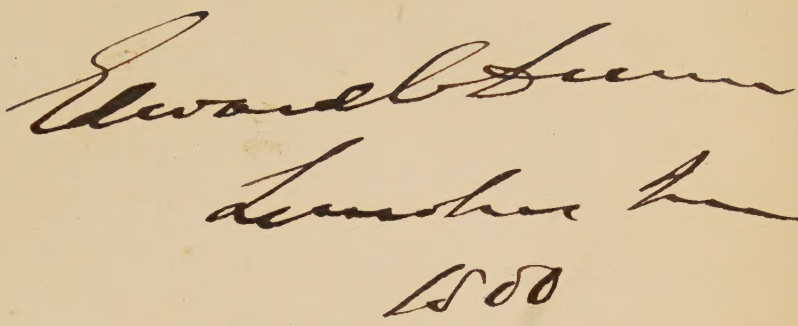

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THE

LAW REPORTS.

529 N

Probate Division.

IN THE COURTS OF PROBATE AND DIVORCE

REPORTED BY

ROBERT A. PRITCHARD, D.C.L., ADVOCATE;

IN THE ADMIRALTY AND ECCLESIASTICAL COURTS

BY

GAINSFORD BRUCE, BARRISTER-AT-LAW;

IN THE PRIVY COUNCIL

BY

HERBERT COWELL, BARRISTER-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

MARTIN WARE AND H. CADMAN JONES,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLII VICTORIA.

[IN THE COURT OF APPEAL.]

NIBOYET *v.* NIBOYET.

1878
Nov. 18.

Divorce—Foreigner—Jurisdiction—20 & 21 *Vict. c.* 85, *ss.* 27, 31.

The Court has jurisdiction to grant a divorce against a foreigner.

A marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman. The husband resided for several years in England, but being a consul for France he retained his domicil of origin. The wife presented a petition for a divorce, alleging adultery committed in England, and desertion. The husband appeared under protest and prayed to be dismissed:—

Held, reversing the decision of Sir R. J. Phillimore (by James and Cotton, L.JJ., Brett, L.J., dissenting), that the Court had jurisdiction to grant a divorce.

5 P D 14
6 P D 40
43 S
8 Q B D
43-8, 5
56, 60

APPEAL from an order of Sir R. J. Phillimore dismissing a petition for a divorce.

The question was, whether the Court had jurisdiction to receive a petition for divorce presented by a wife, her domicil of origin being English, the marriage having been celebrated at Gibraltar, and the alleged adultery having taken place in England; the

1878

NIBOYET v. NIBOYET.

domicil of the husband, who was a consul for France, having been and continuing to be French, although he was residing in England.

Sir R. J. Phillimore dismissed the petition on the ground that the Court had no jurisdiction as against a foreigner.

The facts of the case are fully stated in the report in the Court below (1), and in the judgments of the judges in the Court of Appeal.

July 16, 19, 1878. *Inderwick, Q.C.*, and *Swabey*, for the petitioner. There is no case in which a natural born subject of the Queen has been refused a divorce on any question of domicil. The divorce might not be recognised in some other countries, but such divorces are constantly granted in every Protestant country. The wife being domiciled here is entitled to a divorce valeat quantum. The husband and wife were in this country; the offence was committed here, and they are entitled to the benefit of the law of this country: *Brodie* v. *Brodie* (2); *Ratcliff* v. *Ratcliff* (3); *Firebrace* v. *Firebrace* (4); *Deck* v. *Deck*. (5) If every natural born subject can under ss. 27 and 31 of the Act 20 & 21 Vict. c. 85, present a petition, she must have a right to a divorce: *Bond* v. *Bond* (6); *Le Sueur* v. *Le Sueur* (7); *Simonin* v. *Mallac* (8); *Sottomayor* v. *De Barros*. (9) The question could not have arisen formerly because the canon law was the same all over the world. The statute 23 Hen. 8, c. 9, as to citation out of the jurisdiction, did not apply if the defendant had appeared. In *Lindo* v. *Belisario* (10), the Court decided the question. *Donegal* v. *Donegal* (11) may have been collusive in its origin. In *Shaw* v. *Attorney General* (12), and *Lloyd* v. *Petitjean* (13), the Court assumed jurisdiction. No doubt in many of these cases the parties did not appear, but that cannot have given the Court jurisdiction. It must be admitted that much of the reasoning in *Shaw* v. *Gould* (14) is against the petitioner, but all the Lords did not concur in the reasoning.

(1) 3 P. D. 52.
(2) 2 Sw. & Tr. 259.
(3) 1 Sw. & Tr. 467.
(4) 47 L. J. (P. A. & D.) 41.
(5) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.
(6) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.
(7) 1 P. D. 139.
(8) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(9) 3 P. D. 1.
(10) 1 Hagg. Cons. 216.
(11) 3 Phillim. 597.
(12) Law Rep. 2 P. & D. 156.
(13) 2 Curt. Cons. 251.
(14) Law Rep. 3 H. L. 55.

The observations in *Warrender* v. *Warrender* (1) are strongly in favour of the petitioner.

Gorst, Q.C., and *Greenwood*, for the Queen's proctor. It is clear that every husband and every wife in every country cannot apply to this Court for a divorce. One at all events must be domiciled here, and the wife's domicil is that of her husband, so that here both are foreigners. *Deck* v. *Deck* (2) is the only case in which the Court has pronounced for a divorce between persons not domiciled here. But the courts of one country ought not to make orders affecting the personal status in another country of a person not domiciled here. Even if English subjects by origin domiciled abroad can be divorced here, it does not follow that this Court will interfere against a person who has never been domiciled here. In *Bond* v. *Bond* (3), the Court is said to have followed *Deck* v. *Deck* (2), but that is not so. *Brodie* v. *Brodie* (4), referred to in *Manning* v. *Manning* (5), is in favour of the respondent; and so is *Wilson* v. *Wilson*. (6) *Sottomayor* v. *De Barros* (7) was a very strong case. The doubts as to the wife's domicil raised in *Dolphin* v. *Robins* (8) were not shared by all of their Lordships. *Pitt* v. *Pitt* (9) shews that there cannot be a divorce granted unless the parties are domiciled here. *Yelverton* v. *Yelverton* (10) and *Tollemache* v. *Tollemache* (11) shew that the Court has no jurisdiction in such cases.

Inderwick, Q.C., in reply.

Cur. adv. vult.

Nov. 18. JAMES, L.J.:—This case was argued and decided in the Court below, and has been argued before us, exclusively on one question, viz., whether an English Court has or has not jurisdiction to dissolve the marriage tie between persons not domiciled in England, the dissolution of such a marriage being the real and avowed object of the petitioner in the suit. That such should be the avowed object of the suit, and that the parties should be

(1) 2 Cl. & F. 488.
(2) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.
(3) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.
(4) 2 Sw. & Tr. 259.
(5) Law Rep. 2 P. & D. 223.
(6) Law Rep. 2 P. & D. 435.
(7) 3 P. D. 1.
(8) 7 H. L. C. 390.
(9) 4 Macq. 627.
(10) 1 Sw. & Tr. 574.
(11) 1 Sw. & Tr. 557.

1878

NIBOYET v. NIBOYET.

James, L.J.

desirous of having the opinion and decision of the Court on that question, does not preclude the Court from seeing, or enable the Court to avoid seeing, what the real question raised by the pleadings is. The petitioner after alleging the marriage at Gibraltar, alleges desertion for two years, and upwards, without reasonable excuse, and adulterous intercourse committed and continued from the year 1867 down to the institution of the proceedings, at and in the neighbourhood of Sunderland, in the county of Durham, and therefore in England. The prayer is, that the Court would be pleased to decree the dissolution of the marriage, but to that is added the usual prayer for general relief, the exact words are, "such other and further relief in the premises as to this Honourable Court may seem meet." I read these words as being in substance such further or other relief. The respondent appeared under protest, and pleaded to the jurisdiction in substance, that he was by birth and domicil a Frenchman, and that, although he had resided in England from the year 1862 to the year 1869, and afterwards from the year 1875 to the commencement of the suit, he so resided in the discharge of his duties in the consular service of his own government. And he sums up thus: "During the whole period of the respondent's absence from France aforesaid, he retained his French domicil, and has not now and never had, any domicil in England. By reason of the premises, this Honourable Court has not had any jurisdiction to dissolve the marriage of the respondent with the petitioner." And he prayed to be dismissed from all further observance of justice in this suit. But whether the respondent is or is not right in his contention that the Court has no jurisdiction to dissolve the marriage, the plea to the jurisdiction must fail if the petitioner be entitled to any relief whatever in the suit, on the facts stated in her petition.

Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the Church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce a mensâ et thoro, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became

members of the one Catholic and Apostolic Church. The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicil. If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary, pro salute animæ. It is not immaterial to note that dioceses, and states or provinces, were not necessarily conterminous. The Channel Islands, which are no part of England, are in the diocese of Winchester, and the Isle of Man is in the province of York; and many similar cases might be found on the Continent. And although the laws of the state sometimes interfered by way of coercion, regulation, or prohibition, with the Courts Christian, the latter acted proprio vigore, and they administered their own law, not the law of the state, and they administered it in their own name and not in the name of the sovereign. The language of the Act creating the existing court strikingly illustrates this, when it enacts that all jurisdiction vested in or exercised by any Ecclesiastical Court or person in England, &c., shall belong to and be vested in her Majesty. It was not previously vested in her, although she had appellate jurisdiction as supreme Ecclesiastical judge. If before that Act had passed, the facts alleged in this petition had occurred, and the injured wife had applied to the Bishop of Durham for such relief in the matter as was then competent to him, is it possible to conceive any principle on which the guilty husband could demur to the Ordinary's jurisdiction? The wrong done in his diocese, the offending party openly and scandalously violating the laws of God and of the church in his diocese, why should he decline to interfere? What could it be to him whether the offender was born in any other diocese or born in any other country, Christian, heathen, or Mahometan, and had

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not in the eye of the secular Court abandoned his domicil therein? And what principle of international law could there have been to create the slightest difficulty in the way of a decree for restitution, for separation a mensâ et thoro, or for alimony? The wrong-doer has elected to reside within the local limits of the jurisdiction of the Church Court, and neither the Court of the State nor the Church or State Court of his own country has any ground for alleging that the Church Court appealed to is usurping a jurisdiction, when it by Ecclesiastical monition, declaration, and censure, compels the offending party to give proper redress or declares the offended party to be thenceforth relieved from the obligation to provide for or to adhere to the bed and board of the other; which was what the decree of divorce a mensâ et thoro really amounted to. If I were asked to define, and it were necessary to define, what in the particular case of matrimonial infidelity constituted a matter matrimonial in England at the time when the Act was passed, I should define it to be a case of infidelity where the matrimonial home was in England—the matrimonial home in which the offended husband ought to be no longer bound to entertain the unchaste wife, or in which the chaste and offended wife ought to be no longer bound to share the bed and board of the polluted husband —the matrimonial home, the purity of which was under the watch and ward of the church there. I will give two illustrations of my meaning. It appears to me impossible to suppose that an English Court would lose its jurisdiction or not have jurisdiction because the guilty party consorted with his or her paramour outside the territorial limits of the diocese or on a journey. And, on the other hand, I do not think that an English Court ought to have exercised or would have exercised jurisdiction in the case of a French matrimonial home by reason of an act of infidelity done during a visit, or in transit to or through the English diocese. The proper Court in that case would have been a French Court. I arrive, therefore, at the conclusion that the facts stated in the petition would have constituted a matter matrimonial in England, in which some jurisdiction would, but for the passing of the Act, have been vested in and exercised by an Ecclesiastical Court or person in England, and that such jurisdiction now belongs to and is vested in her Majesty. This appears to me sufficient to dispose

of the plea which denies all jurisdiction whatever in the subject-matter of complaint.

But the same considerations appear to me also sufficient to dispose of the question which was discussed and considered in the Court below, viz., whether the Court can under the English statute decree a dissolution of the tie. The Act was passed expressly "to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage." I read that as "in certain of *such* cases" "in certain of *such* matters matrimonial" in England. And that is followed by the 27th section which is quite universal in its language. "It shall be lawful for any husband . . . . it shall be lawful for any wife." That universality is of course to be limited by the object and purview of the Act, and is to be read thus: "And in any such matrimonial matter in England it shall be lawful for any husband or wife, &c." And except such limitation I am unable to find any limitation which on any principle of construction ought to be implied. Of course it is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state. But I do not find any violation of that comity in the legislature of a country dealing as it may think just with persons native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God or of the land. I am unable, more especially, to imply any limitation of the authority of the Court by reference to the principles of law which were at the passing of the Act in the course of development in the American Courts, where it is now settled that the jurisdiction is to be determined by the domicil of the complaining party at the time of the complaint brought. No such principle had then been established or recognised in any Court in this kingdom, and on the contrary in one very important division of the realm, Scotland, the Scotch Courts had exercised jurisdiction in entire disregard of any such principle. That fact was present to the English legislature with full knowledge of certain very painful and embarrassing consequences resulting from it. But the legislature did not think it necessary or

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fit to make any provision in that behalf. A Scotch divorce a vinculo between persons not Scotch by domicil was held to be void in England as to an English marriage. But so far as Scotland was concerned, and so far as any consequences of the divorce would have to be determined by the Scotch Courts, the divorce was to all intents and purposes valid and effectual. It is very inconvenient and very distressing that two people should be husband and wife in one country and not husband and wife in another, that their marriage should be a lawful marriage in one and bigamous in another, that they should be compellable by the laws of a Christian country to a cohabitation which by the laws of another Christian country would be an adulterous intercourse. And if we could find in the general application of the law as laid down by the American authorities a satisfactory escape from the difficulty, we should be sorely tempted to strain the construction of the English statute to bring it into harmony with that law. But I do not find any such satisfactory solution in that law. In the first place it appears to me to be a violation of every principle to make the dissolubility of a marriage depend on the mere will and pleasure of the husband, and domicil is entirely a matter of his will and pleasure. It would be very desirable no doubt that a judicial decree of dissolution of a marriage affecting the status of husband and wife, a decree in rem, should be if possible recognised by the Courts of every other country according to the principles of international comity. But is such a result possible? Would any French Court recognise the dissolution of a French marriage because the French husband had been minded to establish his domicil in England?

In England a divorce a vinculo is only granted under certain conditions, and with very careful precautions and stringent regulations to prevent its being the result of collusion between the parties. But supposing the collusion to assume the form of an abandonment of the English domicil, and the establishment of a new domicil in some country where a divorce can be obtained, almost if not quite, by mutual consent and arrangement? Would an English Court, or ought it to recognise such a dissolution of the marriage tie and allow the English wife, whose original domicil would be restored thereby to return to this country and contract a

valid marriage here. Moreover a dissolution of the marriage for adultery is only one of the modes by which the status or alleged status of husband and wife is judicially determined. A decree of nullity of a pretended marriage is quite as much a decree in rem, and has all the consequences. How would it be possible to make domicil the test of jurisdiction in such a case? Suppose the alleged wife were the complainant, her domicil would depend on the very matter in controversy. If she was really married her domicil would be the domicil of her husband, if not married then it would be her own previous domicil. If domicil is required to give jurisdiction, that requisite could not be supplied by the negligence or consent of the party; and a decree for dissolution would always be liable to be opened by a fresh litigation raising the question—often a most difficult question—of the domicil.

I find myself unable to arrive at the conclusion that the domicil of the complaining party ought to determine the existence of the limits of the jurisdiction given by the English statute to the English Court. The only limitation which I can find is the limitation of the jurisdiction to those matters which come under the category of matrimonial matters in England, to every one of which the English law, with all its consequences, so far as England is concerned, must be applied. I have endeavoured to ascertain what such a matter is, and I have arrived at the conclusion that the present case comes within that category. It is a misfortune that that law with its consequences may not be recognised in another country, but that misfortune inevitably arises from an irreconcileable conflict of laws produced by the irreconcileable views of different Christian communities as to the dissolubility or indissolubility of the marriage tie, or the sufficiency of the grounds for a dissolution. I do not think that I am overruling any English case in holding that on the facts stated in this petition the wife is entitled to the relief she asks, or in laying down that where and while the matrimonial home is English, and the wrong is done here, then the English jurisdiction exists and the English law ought to be applied.

BRETT, L.J. In this case the wife filed a petition praying for a dissolution of her marriage on the ground of alleged adultery and

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desertion by her husband. The petition in form prayed for a dissolution of the marriage. It contained also in the usual general terms an alternative prayer "for such other and further relief in the premises as to the Court may seem meet." The material facts stated in the different pleadings, as the facts on which the parties relied, were that the parties were in 1856 married at Gibraltar according to English form, that the wife was English by birth, the husband French by birth, that the husband had from 1862 to 1869 acted as French vice-consul at Sunderland, and from 1875 to 1876 and until he was cited to appear in this suit, as French consul at Newcastle. The adultery was committed in England. The wife was resident in England. The petition was served in England. The husband was residing in England. But the husband had never been domiciled in England. The husband appeared under protest and pleaded to the jurisdiction. No one appeared for the husband at the hearing, but the Queen's proctor, by direction of the Court, intervened and submitted for argument two propositions or questions: (1) Whether, it being admitted by the petitioner that the respondent has a French domicil, this Court has any jurisdiction as a matter of general law? (2) If it has not jurisdiction as a matter of general law, whether the particular circumstances of this case give it jurisdiction? In discussing these propositions all the arguments in the Court below were confined to the question whether the Court had jurisdiction to grant a dissolution of the marriage. The judgment was given on that question alone. The arguments of counsel before us were all pointed at that question alone. That was the only relief really desired or really demanded in either court. That being so, it appears to me, though I say it with great deference, that we ought, as matter of decision, to deal with that question alone; dealing with the jurisdiction of the Court in other matters only in case and so far as that jurisdiction may seem to us to assist in determining whether the Court had or had not jurisdiction to grant a dissolution of marriage under the circumstances of this case. The arguments preferred in support of the appeal and in favour of the jurisdiction were: First, that the husband though not completely domiciled in England was bonâ fide and more than casually resident in England, and that such residence made him liable to the jurisdiction of any Court exercising

jurisdiction in matrimonial causes in England; secondly, that his mere presence in England when charged with a matrimonial offence gave jurisdiction to the English Court; thirdly, that the mere application to an English Court of a person claiming its decree against another for an alleged matrimonial offence gives jurisdiction to the Court. It was argued from these propositions that the mere fact of the statute constituting a Court with power to grant divorce gave the Court jurisdiction to entertain the prayer for divorce as against this respondent, if the case could be brought within any of these propositions. But it was further argued, fourthly, that upon the true construction of the terms of the statute it in terms enacts jurisdiction over all persons, English or foreign, and that an English Court must obey the statute. The decision must in the end depend upon the construction of the statute, because before it no Court in England had jurisdiction to grant divorce; but as preliminary to the decision it seems desirable to consider the matter according to some general principles. As has been frequently pointed out, a decree of dissolution of marriage cannot be the judicial declaration of a mere consequence agreed between the parties for the breach of a contract, as in ordinary cases of breach of contract, or a mere compensation or individual remedy for the breach of a private duty as in an action for damages, but can only be a judicial sentence of the law of the country in and for which the Court is acting, by which such Court assumes to alter not only the relation between the parties but the status of both. Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law. The limitations or conditions or effects of such relation and status are different in different countries. As that relation and status are imposed by law, the only law which can impose or define such a relation or status (i.e., relative position) so as to bind an individual, is the law to which such individual is

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subject. The power of a law which enacts restrictions on or grants relaxations of the personal condition of individuals is territorial, i.e., limited. The meaning of that is, that it is only binding on the natural born subjects of the lawgiver or on those who have otherwise become his subjects. By the universal comity of nations foreigners do not by their mere sojourn in a country make themselves subject to its personal laws, other than its police or correctional law, or laws expressly enacted to bind all who are in fact within its territorial limits. By the universal independence of nations each binds by its personal laws its natural born subjects and all who may become its subjects. By the universal consent of nations every one who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it, as if he were a natural born subject of it. It follows then from the nature of the subject-matter, that laws which, for certain enacted or predicated causes, as distinguished from causes agreed upon between the parties, alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural born subjects of the enacting country or foreigners who have become domiciled in it; but they may, consistently with principle and the universal consent of nations, bind both of these. The law then which enables a Court to decree an alteration in the relation between husband and wife, or an alteration in the status of husband or wife as such, is as matter of principle the law of the country to which by birth or domicil they owe obedience. The only Court which can decree by virtue of such law is a Court of that country. Another mode of considering the subject, or another line of argument is this. A judgment or decree determining what is the status of an individval is a judgment or decree in rem. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits and by all parties. Such a judgment, where the jurisdiction of the Court which made it is recognised, is treated as binding and final, not only by all the courts of the same country but by the courts of all countries. The jurisdiction of the Courts of a country in which people have elected to be and are in fact domiciled is in all countries admitted, and the judgment or decree in rem of the courts of a country in which people are domiciled

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is therefore treated as binding in all countries. But the jurisdiction of a country exercised, whether by legislation or by its courts, over the personal status of the subjects of another country who are merely present in it, or are merely sojourning in it, or are merely cited to it, is not admitted by the country of which such people are subjects or by other foreign countries. If, therefore, the Courts of any country should assume, by a decree of divorce or any other decree determining the relation or the status of a married person, to alter that relation or status of a foreigner not domiciled, the decree would not be recognised as binding by the Courts of any other country. Then the relation or status of a married person, would be one in the country of the Court making the decree, and another in all other countries. That is to say, a man or woman would be treated as married in one country and not so in another; or married people might be enjoined to live together in one country and to live apart in another. No Court ought to assume or presume to place people in so deplorable a position, unless forced to do so by the express law of the country whose law it is administering. Another general consideration seems to be as follows. The status of marriage is the legal position of the married person as such in the community or in relation to the community. Which community is it which is interested in such relation? None other than the community of which he is a member, that is the community with which he is living as a part of it. But that in fact is the community in which he is living so as to be one of the families of it. That is the community in which he is living at home with intent that among or in it should be the home of his married life. But that is the place of his domicil. It follows that upon principle the only law which should assume to alter his status as a married man is the law of the country of his domicil; the only Court which should assume to decree such alteration is a Court administering the law of that country. The country or society of his birth is not interested in his marriage status so long as he is domiciled elsewhere.

From all these considerations it seems that the only Court, which on principle ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being

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married, on account of some act which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the Court must be a Court of the country in which the husband is at the time domiciled; because it is incontestable that the domicil of the wife, so long as she is a wife, is the domicil which her husband selects for himself, and at the commencement of the suit she is ex hypothesi—still a wife. The case of an adulterous husband deserting his wife by leaving the country of his domicil and assuming to domicile himself in another, might seem to raise an intolerable injustice; but we cannot help thinking that in such case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, i.e., for the purpose of that suit, of his domicil. So much for the principle, if there were no authorities. It is very right, however, to consider the decisions of the Courts of other countries, and very necessary to consider the decisions of the Courts of our own country; the decisions in our own country before the statute being, it should be observed, necessarily decisions as to the extent to which English Courts, or the English legislature acting as if judicially, recognised the decisions of foreign courts. Now the American authorities seem clear, and they are of great importance, because the American Courts have been called upon oftener than any others to consider and deal with the subject. The results of American decisions seem to be most ably collected and stated in Mr. Bishop's elaborate, and, in my opinion, admirable treatise on Marriage and Divorce. "When parties," he says at § 709, "resort to the Courts of a foreign state or country without a change of domicil, for the purpose of obtaining a divorce to which they would not be entitled by the laws of their own country, the divorce, as we shall hereafter see, will be treated at home as invalid. The true principle is undoubtedly that the foreign tribunal had no proper jurisdiction over the subject-matter, being one of status, with which the Courts of the parties' domicil are alone competent to deal." At § 721: "The tribunals of a country have no jurisdiction over a cause of divorce wherever the offence may have occurred, if neither of the parties has an

actual bonâ fide domicil within its territory; nor is this proposition at all modified by the fact that one or both of them may be temporarily residing within reach of the process of the court, or that the defendant appears and submits to the suit." At § 740: "The place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is quite immaterial." At § 741: "The domicil of the parties at the time the offence was committed, is of no consequence; the jurisdiction depends upon their domicil at the time the proceeding is instituted and judgment rendered." At § 745: "It is immaterial to this question of jurisdiction, in what country or under what system of divorce laws the marriage was contracted." These extracts, which seem to me, after minute reference to the cases on which they are founded, to correctly state the effect of a multitude of American decisions, given by judges of the highest authority, make it clear that in America the only Court which can decree any alteration in the relations between married people or in the status of either of them as a married person, is the Court of the country in which they are domiciled at the time of the institution of the suit. This is also laid down by Story in his treatise on the Conflict of Laws, ch. 5, s. 110: "As to the constitution of the marriage, as it is merely a personal consensual contract, it must be valid everywhere if celebrated according to the lex loci; but with regard to the rights, duties, and obligations thence arising, the law of the domicil must be looked to." It is equally clear that the decisions in Scotland are to the contrary. The Scotch Courts will entertain a suit for divorce, and decree a divorce at the instance of either party who has been resident for a certain period in Scotland, though neither party is Scotch and neither is domiciled in Scotland. This view of the Courts of Scotland was, however, distinctly denied to be the law of England in *Rex* v. *Lolley*. (1) Lolley and his wife were both English; the husband was domiciled in England; the marriage was in England; the husband committed adultery in England and Scotland; the wife instituted a suit against him in Scotland for a divorce; the Scotch Court decreed a divorce; Lolley afterwards, and during the lifetime of the lady who had procured this decree, married another woman in

(1) 2 Cl. & F. 567, n.

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England. He was tried in England for bigamy, and was convicted. The case was argued before all the judges, and the conviction was confirmed, because they held that the Scotch Court had no jurisdiction recognised in England to grant the first divorce, which was therefore to be treated in England as null and void. This decision was treated by Lord Brougham in *McCarthy* v. *De Caix* (1) as a decision that no sentence of a foreign court can annul a marriage made in England. But it has since been shewn that it only amounts to a decision that the Scotch Court had, in the view of the English law, no jurisdiction where the parties were not domiciled in Scotland, though they were for a time resident there. The elaborate judgment of Lord Brougham in *Warrender* v. *Warrender* (2) is a long criticism to shew that this was all that was necessary to be decided in Lolley's case, that if it decided more it was wrong, and that the true and only condition of jurisdiction was domicil. In the case itself, Sir G. Warrender was married in England; the adultery charged against his wife was abroad; the husband was domiciled in Scotland at the institution of the suit; the wife was not in Scotland; it was held by the House of Lords that the Scotch Court had jurisdiction, on account of the domicil of the husband and because the domicil of the husband was the domicil of the wife. In *Conway* v. *Beazley* (3) it was held by Dr. Lushington that where the first husband was English, was married in England, and was not domiciled in Scotland, a sentence of divorce in Scotland was void because the Scotch Court had no jurisdiction. But he clearly indicated his opinion that if the husband had been domiciled in Scotland the sentence there would have been binding everywhere. In *Yelverton* v. *Yelverton* (4), in a suit for restitution by the wife, the marriage was in Scotland, the husband was Irish, and had never been domiciled in England; the wife was resident in England. The English Court held that it had no jurisdiction, on the ground that, at the time of the commencement of the suit the husband was not domiciled in England. In *Firebrace* v. *Firebrace* (5) Sir James Hannen acted, in a suit for restitution of conjugal rights, on the

(1) 2 Cl. & F. 568, n.
(2) 2 Cl. & F. 488.
(3) 3 Hagg. Ecc. Rep. 639.
(4) 1 Sw. & Tr. 574.
(5) 47 L. J. (P.D. & A.) 41.

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authority of that rule, which he said was laid down in *Yelverton* v. *Yelverton*. (1) He declined jurisdiction, on the ground that at the commencement of the suit the husband was not domiciled in England. In *Tollemache* v. *Tollemache* (2) a suit for divorce was instituted in England by a husband domiciled at that time in England. The defence of the wife was that she had been previously divorced in Scotland. But the Scotch sentence was passed when the husband was not domiciled in Scotland. The Court in the second suit held that the first divorce was void because there was no domicil in Scotland, but granted a divorce in the suit before it because there was domicil in England. In *Ratcliff* v. *Ratcliff* (3) the marriage was in India and the adultery in India, but at the institution of the suit the husband was domiciled in England. Lord Campbell, Martin, B., and Cresswell, J., held that the domicil gave jurisdiction. The opinion of Lord Penzance seems clear from what he said in *Wilson* v. *Wilson* (4), as cited in the judgment of the present case. "Now it is not disputed that if the petitioner was domiciled in England at the time the suit was commenced, this Court has jurisdiction; but whether any residence in this country short of domicile, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicil is elsewhere, is a question upon which the authorities are not consistent. It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled." But then there are English cases which are or seem to be to the contrary. In *Simonin* v. *Mallac* (5) the suit was for a decree of nullity instituted by the wife. Both husband and wife were French, and were domiciled in France. The marriage was in England, solemnized according to English, but not according to French, formalities. The marriage was void according to French law, which was stated to be applicable to its subjects marrying abroad. The English Court entertained the suit because the marriage was in England, and held it binding

(1) 1 Sw. & Tr. 574.
(2) 1 Sw. & Tr. 557.
(3) 1 Sw. & Tr. 467.
(4) Law Rep. 2 P. & D. 441.
(5) 2 Sw. & Tr. 67; 29 L. J. (P.M.&A.) 97.

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because it was solemnized in due English form. It may, having regard to the French law, if it was as stated, be at least doubtful whether the suit was well decided. But as the question was whether there ever was a valid marriage, that is to say, whether the contract to marry was ever carried out, the country in which the alleged marriage was solemnized had jurisdiction. In *Deck* v. *Deck* (1) the suit was by the wife for a divorce for adultery and desertion. Husband and wife were English, and the marriage was in England, but the husband was domiciled in America. He had there married another woman. The Court entertained the suit, and granted a divorce. The ground of the decision was that both parties were English, and therefore bound by the Divorce Act. This at the utmost only shews that the Act applies to English subjects, whether domiciled or not, and does not shew that it is applicable to foreigners not domiciled. But I respectfully differ from the decision. In *Callwell* v. *Callwell* (2) the suit was by the husband for a divorce. Husband and wife were Irish; the marriage was in Ireland, the adultery was in England and on the Continent. The husband was not domiciled in England. Cresswell, J., Willes, J., and Hill, J., doubted as to jurisdiction, but entertained the suit on the ground that the wife had appeared without protest, and therefore was too late to plead to the jurisdiction. This decision must be supported on a rule of pleading which is recognised in one of the stages of *Wilson* v. *Wilson* (3) as still in force. It is, unless as matter of pleading, inconsistent with the cases above cited. In *Brodie* v. *Brodie* (4) the husband was Australian and domiciled in Australia. The marriage and adultery were in Australia. The Court entertained the suit. The judgment was: "We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was bonâ fide resident here, not casually or as a traveller. After he became resident here his wife was carrying on an adulterous intercourse in Australia. He is therefore entitled to a decree nisi for a dissolution of the marriage." If this was held to be a domicil, it is consistent with all the cases; if it is to be taken as a decision that there can be a minor

(1) 2 Sw. & Tr. 90; 29 L. J. (P.M. & A.) 129.
(2) 3 Sw. & Tr. 259.
(3) Law Rep. 2 P. & D. 435.
(4) 2 Sw. & Tr. 259.

6 P.D. 42

species of domicil sufficient for one purpose and not for another, I know of no authority or ground of reason for such a distinction. I cannot agree with it. I do not think that cases arising before the Ecclesiastical Courts in which, a matrimonial offence being alleged against subjects or against domiciled foreigners, the question arose whether by reason of their temporary sojourn in one of the dioceses they might be served with process in that diocese, are applicable. Such questions did not raise the point of the general jurisdiction of the law of the country, but rather a question of procedure within an admitted jurisdiction of such law. On the grounds, then, of the nature of the subject-matter of the suit, of the nature of the judgment given in such suit, of the interest of the country in which the dispute arises, of the comity due to other nations, of the immense mischief of a judgment of such a nature being given under circumstances which will prevent it from being recognised everywhere, and of the preponderance of authority in England, I am of opinion that, unless the statute has otherwise enacted, the domicil of the husband in England at the institution of the suit is, according to the true construction of the statute, the fact which gives jurisdiction to the English Divorce Court to decree divorce; that with such a domicil the Court has jurisdiction over a foreigner as well as over an English subject; that without such domicil the Court has no jurisdiction, though the party is an English subject. The same rule, I confess, seems to me to apply, for the same reason, to its power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies, therefore, as it seems to me, to suits for judicial separation and to suits for the restitution of conjugal rights. I do not think it does apply to suits for a declaration of nullity of marriage or in respect of jactitation of marriage. I do not think that the statute binds the Court to entertain and exercise a jurisdiction in matters over which, according to the comity of nations, as interpreted by English judges, and acted upon by the English Parliament in its quasi judicial legislation, the English law ought not to assume authority. It is true that the words of the statute are general; but general words in a statute have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond

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the territorial authority of the legislature. All criminal statutes are in their terms general; but they apply only to offences committed within the territory or by British subjects. When the legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute, as in the Merchant Shipping Act, and in some of the Admiralty Acts. If the legislature of England in express terms applies its legislation to matters beyond its legislatorial capacity, an English Court must obey the English legislature, however contrary to international comity such legislation may be. But unless there be definite express terms to the contrary, a statute is to be interpreted as applicable and as intended to apply only to matters within the jurisdiction of the legislature by which it is enacted. In this statute there are no such definite express terms. It may be observed, moreover, that the preamble confines the purview of the statute to English matrimonial causes. It does not say to British causes, but to English causes. It thus limits the statute and the action of the Court to a part only of her Majesty's dominions or subjects. It cannot be confined to matrimonial offences committed in England, or it would not reach the case of a matrimonial offence committed abroad by a domiciled English husband or wife. Yet it is confined to an English matrimonial cause. It seems to me to follow that it is confined to a matrimonial offence committed by persons domiciled in England. I am of opinion that, upon principles of law, irrespective of the terms used in the statute which are relied on, the Court had no jurisdiction, and that the statute did not by any terms used in it give jurisdiction in this case. I am therefore of opinion that the judgment should be affirmed.

COTTON, L.J. The facts on which this case comes before us have been already sufficiently stated, and it is unnecessary for me to repeat them. I agree with the judge of the Court of Divorce that the fact of the respondent having in 1863 presented a petition to that Court of Divorce seeking for a dissolution of his marriage with his wife, the present petitioner, which was in 1865 dismissed, does not give that Court jurisdiction. The question is, whether, independently of that circumstance, the Court of Divorce has

jurisdiction to make a decree against a respondent not domiciled in England. In considering this question it must be remembered that the respondent has been resident in this country, not casually or as a traveller, but for several years, and that the adultery—the breach of the matrimonial contract on which the petitioner bases her claim to relief—was committed in England. Moreover, the respondent was resident in England at the time when the petition was presented and was served in England with the process of the Court; and the question is, not whether the respondent was liable to be called on to defend himself in the court, but whether the Court has under the circumstances jurisdiction as against a person duly cited to appear before it to make the decree prayed—that is jurisdiction over the subject-matter of the suit. The decision depends on the true construction and effect of the Act 20 & 21 Vict. c. 85. In any court in England that is the only question, for it has been long established that aliens coming into this kingdom are bound by its statutes if on their true construction applicable to them. The petition contains a prayer for general relief, but the only question argued, and that which we have to decide is, whether the Court of Divorce has jurisdiction to dissolve the marriage. I shall, however, for the purpose of arriving at a decision on this point, first consider whether the Court has jurisdiction to grant the petitioner any relief at all. The preamble of the Act recites that it is expedient to establish a Court with exclusive jurisdiction in matters matrimonial in England; and s. 6 vests in her Majesty all jurisdiction exercised by any Ecclesiastical Court in England, and directs that this shall be exercised by the new Court established under the Act. Has this Court jurisdiction to entertain a petition for restitution of conjugal rights or for a judicial separation presented by one of two married persons against the other where both are resident though not domiciled in England, and where the breach of the matrimonial compact has been committed in England either by refusal to cohabit or by adultery? A judgment for either of these objects is, in my opinion, not open to the objection mainly relied on in support of the judgment of the Court below, namely, that a decree for dissolution would alter the status of the spouses, and that this depends on the law of their domicil, and ought to be left to the

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Courts of the country where that may be. If we are to consider the question of public policy, assuredly every state has an interest in taking measures to secure that all residents within its local limits shall faithfully perform the obligations of the marriage contract. But the question is as to the effect of the Act. The complaint of the injured party in the case which I have supposed would, in my opinion, be a matrimonial matter arising in England, and therefore one for the decision of which the Court was constituted. Moreover, the Diocesan Courts, whose jurisdiction is vested in the Court of Divorce, looked to the residence not to the domicil of the respondent for the purpose of deciding whether a suit could be entertained; and I see no reason for supposing that an Ecclesiastical Court, acting pro salute animæ, would have declined to interfere against an offending husband or wife in respect of an act committed within the local limits of its jurisdiction, because the parties though resident within those limits were domiciled elsewhere. There is, in my opinion, no sufficient reason for limiting the right and liability to sue and be sued in the Court of Divorce to persons domiciled in England; and my opinion is, that under the circumstances of this case the Court of Divorce has jurisdiction to entertain a petition for judicial separation against the respondent. If so, has it under s. 27 jurisdiction to entertain a petition for dissolution of marriage? In my opinion it has. That section is in the most general terms. It gives to any husband or any wife power under certain circumstances to present a petition for dissolution; and s. 31, subject to certain exceptions not applicable to the case which we are now considering, gives the petitioner, on proof of his or her case, a right to a decree for dissolution. No doubt the words "any husband and any wife" must be subject to some limitation. They cannot be considered as giving to a husband or wife resident and domiciled abroad a right to petition against a wife or husband, neither resident nor domiciled here; but, in my opinion, this section gives to any husband or wife, who under the earlier provisions of the Act would have a right to apply to the Court for relief, power to present a petition for the remedy given by ss. 27 and 31; and I am of opinion that the Court cannot on the reasonable construction of the Act disclaim jurisdiction to entertain a

petition under s. 27 against the respondent, without holding that the Court has no jurisdiction to give the petitioner any relief in the matter. I have already stated my opinion that the Court has jurisdiction to entertain a petition in such a case as the present against the respondent for judicial separation; and the result, in my opinion, is that he cannot successfully dispute the jurisdiction of the Court to decree a dissolution of his marriage. It is, however, necessary to deal with the argument that the effect of a decree maintaining the jurisdiction of the Court in this case may be that, inasmuch as status depends on the law of the country of domicil, the respondent and the petitioner, though in this country no longer husband and wife, may in other countries be still so regarded. It is true that this may be the result, but the question before us is what on the true construction of the Act is the jurisdiction of the Court—in other words, what is the relief given by the Act to the wife as against her offending husband. I cannot hold that the difficulties which may arise from a decree for dissolution are sufficient to prevent the Court from acting on what, in my opinion, is the true construction of the Act.

Warrender v. *Warrender* (1) was much referred to during the argument, but that case cannot in any way be relied on as a decision in favour of the petitioner's right to sue here, because in that case, in which there was a divorce in the Scotch Court, the domicil of the parties was Scotch. But Lord Lyndhurst in that case, on the assumption that the decree of a Scotch Court would not in England affect the personal status of persons who, though domiciled in Scotland, were married in England, deals with the argument based on this objection in a passage which may usefully be referred to. He says (2) that if these difficulties arise on the true construction of the Act of Parliament, it is for the legislature to amend the matter by legislation, and not for the Court to do so apart from its ordinary rules in construing statutes.

In support of the view that the Court of Divorce has no jurisdiction over a person resident but not domiciled in England, cases have been referred to in which the Court has relied on the domicil of the defendant as giving jurisdiction against a person not resident here. But these cases are not authorities that there is no juris-

(1) 2 Cl. & F. 488. (2) 2 Cl. & F. at p. 560.

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diction against a person resident though not domiciled here. In each case the decision must be taken with reference to the facts before the Court, and a decision that to give the Court jurisdiction as against a respondent not resident in England it is necessary to prove that his domicil is in this country, does not establish that where there is residence in England there must also be domicil here. It is unnecessary to refer to all the cases which have been cited or referred to during the argument. I will, however, refer to one or two of them. In *Yelverton* v. *Yelverton* (1), which was a case relied upon as supporting the judgment under appeal, the respondent was not domiciled in England or resident here; and the decision in effect was that the Court had no jurisdiction to cite him—that is no jurisdiction over him personally, he not being resident here, and that the fact of his not being resident here was pointedly before the learned judge when he gave his judgment appears from a passage of the report (2): "Major Yelverton is not an Englishman; he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of *Carden* v. *Carden* (3), I infer that Dr. Lushington would have held that there was no jurisdiction unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest." In *Tollemache* v. *Tollemache* (4), another case relied upon, the Court, on the petition of the husband, granted a decree of divorce after a decree for divorce obtained by him in Scotland, but did so not on the ground that the decree of the Scotch Court was void in Scotland, but because, assuming that the decree obtained in Scotland was sufficient to enable the divorced wife to marry in that country, which assumes that the Scotch Court had jurisdiction, it did not give the petitioner—the man who was domiciled in England—a personal capacity to marry there. That is in effect that the decree of the Scotch Court for Divorce, though effectual there, was of no effect in England. In *Tovey* v. *Lindsay* (5) the House

(1) 1 Sw. & Tr. 574.
(2) 1 Sw. & Tr. at p. 590.
(3) 1 Curt. 558.
(4) 1 Sw. & Tr. 557.
(5) 1 Dow. 117.

of Lords did not pronounce any final decision, and the question was whether a wife, who was residing in England and living separate from her husband under the provisions of a deed of separation, could be cited to appear in Scotland where her husband was domiciled. It was a question of jurisdiction over the person of the defendant, not over the subject of the suit.

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In my opinion there is no authority—certainly none binding on this Court—for holding that in this case the Court has no jurisdiction to decree a dissolution. I think that on the true construction of the Act the Court ought to entertain the petition, and that the judgment dismissing the petition on the ground of want of jurisdiction ought to be reversed.

Protest overruled and action remitted.

Solicitors for petitioner: *Chapman, Turner, & Prichard.*
Solicitor against petition: *Queen's Proctor.*

[IN THE COURT OF APPEAL.]

THE LAURETTA. (1878. I. 118.)

1879
March 28.

Appeal—Costs—Notice—Order LVIII., rule 6.

Where on an appeal notice has been given by the respondents that they intend to apply to have the judgment below varied, and the appeal is then dismissed, the appellants will be ordered to pay the costs of the appeal except such as were occasioned by the notice.

IN this case an action had been brought by the owners of the Inman steamship *City of New York* against the owners of the brigantine *Lauretta* for damages occasioned in a collision near the Tuskar Light in February, 1878. There was a counter-claim on behalf of the *Lauretta*. Sir R. J. Phillimore, judge of the Admiralty Court, assisted by Elder Brethren of the Trinity House, found both ships to blame, and condemned the defendants in a moiety of the plaintiffs' damage, and the plaintiffs in a moiety of the defendants' damage.

The plaintiffs appealed; and the defendants gave notice that they intended to apply to the Court of Appeal on behalf of the *Lauretta* to reverse or vary the judgment.

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The Court of Appeal (James, Baggallay, and Bramwell, L.JJ., and two Nautical Assessors), after hearing both sides, held the decision of the Court below to be right, and dismissed the appeal.

Phillimore, *Myburgh*, and *Goldney*, for the defendants, asked for the costs of the appeal. The notice was given according to the directions of Order LVIII., rule 6, and could have occasioned no costs.

Milward, *Q.C.*, *Butt*, *Q.C.*, and *Clarkson*, for the plaintiffs. There were cross appeals, and both are dismissed, therefore there ought to be no costs on either side. That was the practice on appeals to the Privy Council.

The Court directed the appellants to pay the costs, deducting such as had been occasioned by the notice given by the respondents.

Appeal dismissed.

Solicitors for plaintiffs: *Speechly, Mumford, & Co., for Duncan & Co., Liverpool.*

Solicitors for defendants: *Gregory & Co., for J. W. Carr, Liverpool.*

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July 9.

THE LADY DOWNSHIRE. (1876. H. 297.)

Damage—Mersey Sea Channel Act, 1874 (37 & 38 *Vict. c.* 52), *sect.* 1, *subsect.* 2 — *Infringement by Possibility contributing to Collision — The Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

It is provided by 37 & 38 Vict. c. 52, s. 1, that all vessels having two or more masts shall, whilst lying at anchor in the sea channels leading to the river Mersey, exhibit two white lights, and that any general Regulations for preventing Collisions at Sea for the time being in force under the Merchant Shipping Acts shall be construed as if this regulation were added thereto. A vessel failing to exhibit lights as required by this section is liable to be held in fault under the 17th section of the Merchant Shipping Act, 1873, for the provisions of the 1st section of 37 & 38 Vict. c. 52, are to be regarded as virtually incorporated with the Regulations for preventing Collisions at Sea, made under the Merchant Shipping Acts.

THIS was an action of damage instituted on behalf of the owners of the three masted schooner or brigantine, *Edward John*, of 137 tons register, against the steamship *Lady Downshire*.

The statement of claim alleged, in effect, that on Friday, the 12th of May, 1876, the *Edward John* was at anchor in the Crosby channel in the river Mersey, with an anchor light duly exhibited,

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when the *Lady Downshire* came up the channel with her masthead light and her side lights open, and rapidly approaching ran into the *Edward John*, striking her violently on the starboard bow and causing her to sink; that the *Lady Downshire* was to blame for not keeping clear of the *Edward John*, and for neglecting to keep a good look-out, and to observe the 16th article of the Regulations for preventing Collisions at Sea.

The statement of defence alleged that, on the day of the collision, the *Lady Downshire*, with a good look-out, was proceeding up the Crosby channel in charge, by compulsion of law, of a duly appointed Liverpool pilot, and whilst so proceeding, a white and green light was seen about a point or a point and a half on the starboard bow, apparently about two miles off; that shortly afterwards the green light disappeared and a red light was seen; that there being but one white light the lights seen were supposed to be the masthead and side lights of a steamship, and upon the red light being seen the helm of the *Lady Downshire* was, by order of the pilot, put hard a-port and her engines stopped and reversed, when it was seen that the white light was on board the *Edward John* and the coloured lights were those of another vessel, and although the helm of the *Lady Downshire* was kept hard a-port and her engines were kept reversing, her port bow came into collision with the starboard bow of the *Edward John*; that the collision was occasioned by the neglect of the *Edward John* to exhibit two bright lights in pursuance of the provisions of 37 & 38 Vict. c. 52, s. 1, but that if any blame was attributable to the *Lady Downshire*, it was wholly attributable to the neglect or default of her pilot.

Witnesses were examined orally in court on behalf of the plaintiffs. The evidence of the witnesses proved that the collision occurred within the limits within which, under the provisions of 37 & 38 Vict. c. 52, a vessel of the description of the *Edward John* ought when at anchor to have exhibited two bright lights, that the *Edward John*, at the time of the collision, was in charge of a Liverpool pilot; and that such pilot had informed the master of the *Edward John* that he ought to exhibit two bright lights, but that the master had answered that he had only one anchor light on board. No witnesses were examined on behalf of the defendants.

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Milward, Q.C., and *W. G. F. Phillimore*, appeared for the plaintiffs.

Butt, Q.C., and *E. C. Clarkson*, for the defendants.

SIR ROBERT PHILLIMORE. The first question to be determined in this case is, whether 37 & 38 Vict. c. 52, s. 1, is or is not brought within the 17th section of the Merchant Shipping Act, 1873. The former Act, entitled an Act to make Regulations for preventing collisions in the sea channels leading to the river Mersey, enacts in the first section, that—

> Any general Regulations for preventing Collisions at Sea for the time being in force under the provisions of the Merchant Shipping Acts, shall be construed as if the following regulations were added thereto.

And then there follow two sub-sections, the first of which contains provisions as to the course to be taken by steamships and vessels in tow of steam-ships "when navigating in the sea channels or approaches to the river Mersey, between the Rock lighthouse and the furthest point seawards, to which such sea channels or approaches respectively are for the time being buoyed on both sides." The second sub-section provides as follows:—

> Every ship at anchor in the said sea channels or approaches, within the limits aforesaid, shall carry the single white light prescribed by Article 7 of the General Regulations for Preventing Collisions at Sea, made under the authority of the Merchant Shipping Acts Amendment Act, 1862, at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise, near the bow of the ship where it can be best seen; and in addition to the said light all ships having two or more masts shall exhibit another similar white light, at double the height of the bow light, at the main or mizzen peak, or the boom topping lift, or other position near the stern, where it can be best seen.

It has been admitted in this case, and is proved by the evidence, that the collision occurred within the sea channels of the river Mersey, within the meaning of these words as they are used in the sub-section to which I have just referred. It has also been admitted that the plaintiffs' vessel, the *Edward John*, was a three-masted brigantine, and ought, according to the direction in such sub-section, to have carried two lights, whereas she only carried one on her fore-stay, though that was a light of considerable power. On these admitted facts, it has been contended by the counsel for the plaintiffs, that according to 37 & 38 Vict. c. 52 that Act is not incorporated with the Merchant Shipping Acts;

and that consequently it is not open to the defendants to contend that the *Edward John* by the absence of a second light has brought herself within the 17th section of the Merchant Shipping Act, 1873, whereby it is provided as follows:—

> If in any case of collision it is proved to the Court before which the case is brought that any of the Regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

Now, after giving my best attention to the arguments on both sides, I am of opinion that the words of the 17th section of the Merchant Shipping Act, 1873, "Regulations for preventing collisions contained in or made under the Merchant Shipping Acts, 1854 to 1873," do refer to and include the regulations contained in 37 & 38 Vict. c. 52. Consequently, as it is admitted that the *Edward John*, by exhibiting only one anchor light, infringed one of such last-mentioned regulations, and as we are of opinion that on the result of the evidence the want of a second light was such an infringement of the regulation as might by possibility have contributed to the collision, I must pronounce that the *Edward John* is to blame for the collision, unless I think it has been shewn to my satisfaction that the circumstances of the case made departure from the regulation necessary. Now I am of opinion that no such circumstances are shewn in this case. The pilot was perfectly aware of the law and told the master to put up two lights. The master said he had no second light, and could not exhibit it. I am therefore of opinion that the *Edward John* must be holden to blame under the statute, no sufficient reason being given for her noncompliance with 37 & 38 Vict. c. 52. The question remains whether the *Lady Downshire*, the vessel proceeded against, is also to blame for the collision. [His Lordship then proceeded to comment on the evidence with regard to the manœuvres taken by the *Lady Downshire*, and coming to the conclusion that she had been guilty of negligent navigation, pronounced both vessels to blame for the collision.]

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

1878
Aug. 7.

THE SOPHIA COOK. (Liv. 1878. V. 306.)

Bottomry—Practice—Interest.

A bottomry bond on ship, freight, and cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, and a suit was instituted by the bondholder against ship, freight, and cargo, to recover the amount of the loan and interest, and the additional premium of 10 per cent:—

Held, that the additional premium of 10 per cent. could not be enforced against the cargo, but that the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment.

THIS was an action of bottomry instituted on behalf of the assignee of a bottomry bond on the brigantine *Sophia Cook*, of Halifax, Nova Scotia, her cargo and freight, against the said vessel, her cargo and freight. The proceedings were carried on in default against the ship, but an appearance in the action was entered on behalf of the owners of cargo.

The statement of claim, after alleging, inter alia, that the *Sophia Cook* having received damage on a voyage from New York to Goole, and put in to Philadelphia for repairs and supplies, and there borrowed on bottomry the sum of $4515 43*c.* to pay for such repairs and supplies, proceeded in the 3rd and 5th paragraphs thereof in substance as follows:—

3. By a bond or instrument of bottomry, dated the 3rd day of May, 1878, the master of the *Sophia Cook* did, in consideration of the sum of $4515 43c. advanced to him by one John Smith, of Halifax, Nova Scotia, bind himself, the *Sophia Cook*, her freight and cargo, to repay the said sum of $4515 43c., with a bottomry premium thereon of 8 per cent., amounting to $361 23c., at the exchange of $4 92c. to the pound sterling, at or before the expiration of five days after the arrival of the *Sophia Cook* at her anchorage in the port of discharge, with an additional premium of 10 per cent. on the sum advanced, if the said sum and premium should not be paid within the said period of five days. But in case of the loss of the *Sophia Cook* such an average as should by custom become due on the salvage was alone to be paid.

5. The *Sophia Cook*, after such bond given, proceeded on her voyage, and arrived, on or about the 13th of June last, safely at her anchorage in the port of Goole, being her port of discharge, bringing her cargo and earning freight. The said period of five days expired on the 18th of June last, without payment being

made of the sum due under the said bond, and the plaintiff is and was at the date of the issue of the writ in this action entitled to sue for and receive the said sum of $4515 43*c.*, and $361 23*c.*, amounting at the exchange aforesaid to the sum of 991*l.* 3*s.* 10*d.*, and the said additional premium of 10 per cent. on the sum advanced amounting to $451 54*c.*, or, at the exchange aforesaid, to the sum of 91*l.* 15*s.* 6*d.*

The defendants in their statement of defence admitted the validity of the bottomry bond save so far as it purported to bind the cargo to an additional premium of 10 per cent., and alleged that the master of the vessel had no authority to bind the cargo-owners to the payment of such additional premium. The action was heard on affidavits before the judge in Court.

In an affidavit made by the plaintiff it was stated in effect that in fixing the amount of maritime interest payable on a bottomry bond the prompt payment of the bond on the termination of the risk was a material consideration, and that in practice the masters of vessels obtained loans on bottomry at lower rates of premium in cases where they allowed a claim to be inserted in the bond providing for the payment of an additional rate of premium if delay should occur in payment of the money due on the bond.

W. G. F. Phillimore appeared for the plaintiff. The question whether the Court will assist the plaintiff in obtaining payment of the additional premium referred to in the statement of claim cannot be considered as settled. In the case of *The D. H. Bills* (1) the Court refused, as against the owners of cargo, to give effect to a provision in the bottomry instrument in that case, which stipulated that in default of prompt payment of the principal money and maritime interest due on the bond 10*l.* per cent. interest until payment should be paid. In the subsequent case of *The Cargo Ex Vineland* (2), where the cargo owners did not appear at the hearing, the Court pronounced for the principal money due on a respondentia bond with maritime interest, and additional interest exceeding 4 per cent. per annum in respect of the time since the bond fell due. It is in the interest of shipowners that no undue restriction should be placed on the terms on which money can be obtained on bottomry.

E. C. Clarkson, for the defendants. In the case of *The Cargo*

(1) See note at end of case. (2) Not reported. [July 23, 1878. M. 180.]

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Ex Vineland (1) the cargo owners did not appear, and the case cannot be considered as an authority.

SIR ROBERT PHILLIMORE. I cannot allow the additional premium of 10 per cent. The practice in the registry is to allow interest at 4 per cent. from the date of the instrument of bottomry becoming payable until payment thereof, and I cannot sanction any additional allowance.

I adhere to the rule I acted upon in the case of *The D. H. Bills.* (2)

Solicitors for plaintiffs: *Bateson & Co.*

Solicitor for defendants: *Carr.*

(1) Not reported. [July 23, 1878. M. 180.] (2) See note at end of case.

June 25, 1878.

THE D. H. BILLS. (1878. B. 150.)

IN this case the master of the American ship *D. H. Bills*, in consideration of a loan on bottomry, executed an instrument of bottomry on ship, freight and cargo. The material portions of such instrument of bottomry were substantially as follows:—

At or before the expiration of three days after the ship *D. H. Bills* should have arrived at Newport, Monmouth, aforesaid, and before the unloading of any part of the said cargo, pay free of any average whatever, to the said Messrs. Howard, Fox, & Co., or their assigns, the sum of 1295*l.* British sterling, together with the further sum of 161*l.* 17*s.* 6*d.* British sterling for bottomry premium thereon at the rate of 12*l.* 10*s.* per centum, making together the sum of 1456*l.* 17*s.* 6*d.* British sterling: and also, in case default should be made in payment of the said last-mentioned sum at the time aforesaid, pay to Messrs. Howard, Fox, & Co., or their assigns, interest for the same sum at the rate of 10*l.* per centum per annum from the time aforesaid until payment of the said sum.

After the safe arrival of the *D. H. Bills* at Newport, Monmouthshire, default was made in payment of the sums due on bottomry at the time specified, and the plaintiff instituted this action against the *D. H. Bills*, her cargo and freight, and thereon claimed to recover the above-mentioned sum of 1456*l.* 17*s.* 6*d.*, and an additional sum of interest at the rate of 10 per cent. per annum from the time at which, according to the instrument of bottomry, payment ought to have been made, until payment thereof.

An appearance in the action was entered for the owners of the cargo on board the *D. H. Bills.*

The action was heard.

W. G. F. Phillimore, on behalf of the plaintiff, moved for judgment in the action.

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J. P. Aspinall, for the defendants, did not dispute the right of the plaintiff to payment of the sums lent on bottomry, together with maritime interest for the same, but submitted that the master of the *D. H. Bills* had no authority to bind the cargo owners to the payment of the 10 per cent. interest claimed in respect of delay in payment.

SIR ROBERT PHILLIMORE. The defendants in the case have taken an objection to the Court making any order which might render them liable for the payment of the additional interest at 10 per cent., which the master of the *D. H. Bills* has agreed should be paid. The practice in the registry in bottomry cases is, I am informed, to allow interest at the rate of 4 per cent. from the date from which the amount secured on bottomry ought to have been paid until payment thereof. To this rate of interest the plaintiff will be entitled. Subject to the observations I have made, I pronounce for the validity of the instrument of bottomry in this case.

Solicitors for plaintiff: *Clarkson, Son, & Greenwell.*
Solicitors for defendants: *Waddilove & Nutt.*

THE TIRZAH. (1878 L. 267.)

Nov. 22

Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Infringement of Regulations for preventing Collisions at Sea.*

Where in a case of collision between ships, it is proved that the Regulations for preventing Collisions at Sea have been infringed by one of the ships, and that such infringement might possibly have caused or contributed to the collision, the ship guilty of such infringement will be held to blame, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary.

A brig of 239 tons, beating to windward on the starboard tack at night, encountered such rough weather as to render it justifiable in the opinion of the Court that her side lights should be removed from the place where they were usually carried in the fore-part of the vessel to the after-part near the taffrail, and the lights were so removed. In this latter position the lights were obscured to the extent of a point, or a point and a half, on either bow. The brig came into collision with a barque on the opposite tack:—

Held, that the circumstances of the case did not justify the brig in carrying the lights so as to be obscured as above-mentioned, and that the brig must be deemed to be in fault under the 17th section of the Merchant Shipping Act, 1873.

THIS was an action of collision instituted on behalf of the barque *Duke of Wellington* against the brig *Tirzah*.

The statement of claim alleged in substance as follows:—

2. About half-past twelve A.M. of the 28th day of August, 1871, the *Duke of Wellington* was off Orfordness; the wind was west south-west; the weather was

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very clear, but very dark, the tide was ebb; the *Duke of Wellington*, under all plain sail, except mainsail and foretopgallantsail, was heading north-west and making from three to four knots an hour, the regulation lights were duly exhibited, and a good look-out was being kept on board her.

3. In these circumstances those on board the *Duke of Wellington* saw a vessel without lights from a quarter to half a mile off and about three points on her starboard bow. This vessel, which was the *Tirzah*, was watched, but no light could be seen. Suddenly the *Tirzah* shewed a red light very close to the *Duke of Wellington*, whereupon the *Duke of Wellington* was put hard a-port and the spanker sheet and lee main braces were let go. But before the *Duke of Wellington* could pay off enough the *Tirzah* came into collision with her; the two vessels striking on their port bows, and much damage being done to the *Duke of Wellington*.

4. Those on board the *Tirzah* broke Articles 2 and 5 of the Regulations for preventing Collisions at Sea.'

5. The collision was caused by the breach of the articles stated in the last paragraph hereof, or otherwise by the negligence of the defendants, or of those on board the *Tirzah*.

The defendants delivered a statement of defence and counter-claim. The defence was in substance as follows:—

1. Shortly before 0·30 A.M. on the 28th day of August, 1878, the brig *Tirzah*, of 239 tons register, of which the defendants were owners, manned by a crew of eight hands all told, whilst on a voyage from Archangel to London with a cargo of oats, was in the North Sea off Orfordness.

2. The wind at such time was about west by south, blowing a strong breeze, and the weather was clear, and the *Tirzah* was sailing close-hauled on the starboard tack, and was proceeding at the rate of about one knot and a half per hour, with her regulation sailing lights properly exhibited, and with a good look-out being kept on board her.

3. At such time the green light of a vessel, which proved to be the *Duke of Wellington*, was seen at the distance of about one mile from the *Tirzah*, and bearing about three points on her port bow. The *Tirzah* was kept close-hauled by the wind in the expectation that the *Duke of Wellington* would keep out of the way, but the *Duke of Wellington* approached and rendered a collision imminent, and although she was loudly hailed, and the helm of the *Tirzah* was put hard down to ease the blow, the *Duke of Wellington* with her stem struck the port bow of the *Tirzah*, and did her considerable damage.

4. Save as hereinbefore appears, the defendants deny the truth of the several allegations in paragraphs 2 and 3 of the statement of claim.

5. The defendants deny the truth of paragraphs 4, 5, and 6 of the statement of claim.

7. The *Duke of Wellington* improperly neglected to take proper measures for keeping out of the way of the *Tirzah*.

8. The collision was caused by the negligent and improper navigation of the *Duke of Wellington*.

By way of counter-claim the defendants repeat the several averments made in the defence, and claim a declaration that they were entitled to the damage sustained by them by reason of the said collision.

Nov. 21, 22, 1878. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Witnesses on behalf of the plaintiffs and defendants were examined orally in court.

It appeared from the evidence that before the passing of the Merchant Shipping Act, 1873, the *Tirzah* usually carried her side-lights on stanchions placed on the quarter just before the taffrail, and that the lights so placed had been passed as efficient by the officers of the Board of Trade. After the passing of the Merchant Shipping Act, 1873, the officers of the Board of Trade had ordered the lights to be placed in the fore-part of the vessel, and they had been so placed accordingly, and from that time the lights, in ordinary weather, had been carried in the fore-part of the vessel. On the night in question, the weather being rough and the spray breaking over the bows of the *Tirzah*, her master removed the lights from forwards and placed them on the stanchions on the quarter. The lights, when so placed, were obscured to the extent of a point or a point and a half on either bow. The rest of the evidence, so far as material, can be gathered from the judgment.

Butt, Q.C., W. G. F. Phillimore, and *Stokes,* for the plaintiffs. There is evidence that the side-lights of the *Tirzah* were obscured to the extent of a point or so on either bow; if so, the *Tirzah* infringed the Regulations for preventing Collisions at Sea, in such a manner as might by possibility have contributed to the collision, and must be held to be in fault under the 17th section of the Merchant Shipping Act, 1873: *The Magnet* (1); *The Fanny M. Carvill.* (2)

E. C. Clarkson, and *Myburgh,* for the defendants. No question upon the 17th section of the Merchant Shipping Act, 1873, can arise in this case, for the two vessels were approaching each other in such a direction that the side-lights of the *Tirzah* would, if there had been a proper look-out on board the *Duke of Wellington,* have been seen. If, therefore, there was any infringement of the regulations on the part of the *Tirzah,* such infringement could by no possibility have contributed to the collision: *The English-*

(1) Law Rep. 4 A. & E. 417. (2) 44 L. J. (Adm.) 34.

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man. (1) Again, if the *Tirzah* did infringe the Regulations for preventing Collisions at Sea, the infringement was justified by the circumstances of the case, the state of the weather having rendered it necessary that the lights of the *Tirzah* should be removed aft.

Butt, Q.C., in reply. It is impossible to say that the obscuration of the lights of the *Tirzah* could by no possibility have contributed to the collision. Assuming it was necessary that the lights of the *Tirzah* should be removed aft, it cannot have been necessary that they should have been so placed as to be obscured.

SIR ROBERT PHILLIMORE. This is a case of collision which happened between twelve and one in the morning of the 28th of August, and about ten miles from Orfordness. The direction of the wind was stated to be west south-west or west by south, and the weather was clear but dark. It appears that there was a strong and heavy sea, and at the time the tide was ebb. The vessels that came into collision were the barque *Duke of Wellington* and the brig *Tirzah*. The *Duke of Wellington* was by far the larger ship, being 794 tons register, and the *Tirzah* was only 239 tons register. The *Duke of Wellington* was bound from South Shields to Carthagena, with a crew of sixteen hands, and a cargo of coal and coke. Between twelve and one o'clock she says that she had all her plain sail set, except mainsail and foretopgallantsail, and was heading north-west, making three to four knots an hour. No question arises as to her lights, which were admitted to be proper. She says she saw a vessel without lights from a quarter to half a mile off, and about three points on her starboard bow; and that the vessel was watched. There is no doubt it was the *Tirzah*, but no light could be seen. Suddenly she appeared close to the *Duke of Wellington*, who could not pay off soon enough, and the two vessels struck together on their port bows.

Now the *Tirzah's* case is, that she was close-hauled on the starboard tack, and was under her topsails courses, jib, and trysail, proceeding, as she says, at the rate of about one and a half knots an hour, and that she saw the green light of the *Duke of Wellington* at a distance of about a mile, and about three points on her port bow. She was kept close-hauled by the wind, expecting

(1) 3 P. D. 18.

the *Duke of Wellington* would keep out of the way, but the *Duke of Wellington* approached, and a collision took place. There is no dispute on this part of the case that the *Duke of Wellington* was a vessel on the port tack, and the *Tirzah* was on the starboard tack, therefore it was the duty of the former vessel to keep out of the way. The *Duke of Wellington* was unable to discharge this duty, she says, on account of the insufficiency of the red light of the *Tirzah*, and the 17th section of the Merchant Shipping Act, 1873, has been invoked in her favour. This section provides,

> If, in any case of collision, it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

Now this section has undergone much discussion, both in this Court and before the Judicial Committee of the Privy Council, and the result of the cases is to establish the law to be that in any case where an infringement of the regulations could by any possibility have caused or contributed to the collision, the ship infringing the regulations is brought under the section to which I have referred. Now, in this case, the *Tirzah* did usually carry her lights forward, and at eight or ten o'clock of the night previous to the collision they were removed aft, and, as I understand, fixed close to the taffrail.

One of the questions that I have put to the Elder Brethren of the Trinity House is, whether, having regard to the state of the weather the act of the master in shifting the lights was justifiable, and they are of opinion that it was, and in that I agree. The lights were, however, unfortunately placed aft in such a position as unquestionably to infringe the regulations, to what extent is perhaps doubtful, but we think the obscuration must have been to the extent of a point or a point and a half on either bow.

The second question arises in this state of things: could such an infringement of the regulations by possibility have contributed to the collision? That is evidently a question for the Elder Brethren, who have assisted me with their nautical skill, and, in their opinion, the question must be answered in the affirmative.

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Another question, which is, perhaps, the most important question in this case, then arises, with regard to the last branch of the same section, namely: were there in this case any circumstances which made a departure from the regulations necessary? It appears, on the evidence, that before the passing of the Act of 1873, the officers of the Board of Trade in Dublin passed the lights of the *Tirzah* as efficient and properly placed, although they were then in the same position as they were after they had been shifted on the night of the collision. It also appeared in evidence that soon after the passing of the Act in question the lights of the *Tirzah* were again inspected, and, under the orders of the Board of Trade inspectors were placed forward, and were from that time, as a general rule, carried in the fore-part of the vessel. Now it has been argued, with considerable acuteness, that the *Tirzah* was constrained, by the state of the weather, to remove her lights from the position forwards in which they had been up to eight or ten P.M. in the evening before the collision, and in which they were placed by the direction of the officers of the Board of Trade; and that the placing of the lights in their original position aft was the best makeshift that could be adopted in the emergency. After giving much consideration to this argument, I have arrived at the conclusion that it does not offer a sufficient excuse for the infringement of the regulations that this vessel was in such rough weather as to render it justifiable or necessary that her lights should be removed from forward to aft. It seems to the Court that, if it was necessary to place the lights aft, proper places ought to have been provided in the after-part of the vessel, so that the lights, when carried aft, would have been visible according to the regulations. Such places were not provided; I must, therefore, under the provisions of the statute, hold that the *Tirzah* is deemed to be in fault for the collision.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Cooper & Co.*

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Jan. 29.

Jurisdiction—Salvage—National Vessel of War commissioned by Government of Foreign State.

A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and her cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The Court refused to order a warrant to issue for the arrest of the ship or cargo, and held it had no jurisdiction to entertain the suit.

Part 137
162-6
5 P.D. 149

THIS was an action of salvage instituted on behalf of the owner, master, and crew of the British steam-tug *Admiral* against the United States frigate *Constitution*, and her cargo for the recovery of salvage remuneration for services rendered to the property proceeded against.

On the 27th of January counsel on behalf of the plaintiffs applied ex parte to the Judge in Court to order a warrant to issue for the arrest of the *Constitution*, and for a warrant to arrest her cargo.

The affidavit to lead warrants made by the owner of the *Admiral* was, so far as material, as follows:—

On the 17th day of January instant, I received a telegram from Lieutenant Viry, Swanage Station, to the following effect:—

"American frigate *Constitution* ashore on Bollard Point. Send strongest tug immediately. Two if possible."

I thereupon despatched my tug *Admiral* to the assistance of the vessel *Constitution*, and she rendered important and efficient salvage services to the ship *Constitution* and her cargo, and was instrumental in getting the vessel off the ground.

After the salvage services were completed, I, on the 21st of January instant, received the following letter from the consular agent at Portsmouth:—

"United States of America.

"Consular Agency, Portsmouth.

"20th January, 1879.

"Mr. George Drover,—If you have any claim to present against the U.S. frigate *Constitution*, please put it in writing, and bring it to my office as early as possible to-morrow forenoon. If you cannot come, forward it to me by return post. The ship sails soon.

"I am, sir, your obedient servant,

"C. E. McCheane, U.S. Consular Agent."

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In reply to this letter, I, on the 21st instant, sent the following telegram :—

"Impossible my coming Portsmouth. I claim 1500*l.* services rendered by my tug *Admiral*. You no doubt are aware my tug was the means of towing *Constitution* off. *Malta* and the three other tugs could not move ship, but when we commenced towing ship immediately came off. Please wire reply immediately, as I leave shortly for London."

Afterwards, on the 23rd instant, I received a sum of 200*l.* in recognition of the services rendered by my said tug accompanied by the following letter :—

"United States of America.

"Consular Agency, Portsmouth.

"22nd January, 1879.

"Mr. George Drover, Cowes.

"Sir,—I am instructed by the captain of the U.S. frigate *Constitution*, on behalf of the United States Government, to forward to you a cheque for 200*l.*, in recognition for the services rendered to that vessel upon the occasion of her stranding on Bollard Point by your tug *Admiral*, and by the master and crew of that tug. I shall be obliged to you to settle with the master and crew accordingly.

"It may prevent some misconception on your part if I inform you the value of the *Constitution* and cargo, principally empty casks and machinery, on board her does not exceed 12,000*l.* My government are happy that the services, with the important co-operation of H.B.M. tug *Malta*, were rapidly and easily successful.

"I am, sir, your obedient servant,

"C. E. McCheane, U.S. Consular Agent."

Such sum of 200*l.* is entirely inadequate and insufficient compensation for the services rendered, and on the 25th instant I returned the said sum to the consular agent, accompanied by the following letter :—

"January 25th, 1879.

"McCheane, Esq. *Constitution.*

"Sir,—Herewith please find cheque received to-day for 200*l.* I cannot think of accepting so small a sum. I am willing to refer the matter to the Admiralty Court. If you wish to communicate with me, please address letter to care of Clarkson, Son, & Greenwell, 24, Carter Lane, Doctor's Commons, London. I shall be there Monday morning, 10 o'clock.

"Yours truly,

"George Drover."

The frigate *Constitution* had on board her at the time of the services a valuable cargo, consisting principally of machinery belonging to private individuals, exhibitors at the Paris Exhibition, and was on a voyage from Havre to New York. I am informed and believe that the value of the vessel *Constitution* and her cargo amount to considerably over 12,000*l.*

On the 28th of January instant, I received a further letter from the American consulate to the following effect :—"Your favour of the 25th instant returning the cheque for the 200*l.* has been received. This award for the services of your tug *Admiral* to the *Constitution* was made advisedly, and is considered by competent and disinterested experts as ample and liberal, and my information is that it is final. Cheque will remain at my office till noon of the 15th of February next, when, you having failed to call for it, its amount will be forwarded by me to the United States Navy Department. The said vessel *Constitution* and

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the cargo on board her are now lying off Portsmouth, and will leave immediately for New York."

Applications have been made by my solicitors to the American Legation, and I am unable to obtain sufficient compensation for the services of the said tug without the aid and process of this honourable Court.

The judge ordered the motion to be adjourned, and directed that notice thereof should be given in the meantime to the Secretary for State for Foreign Affairs; to the Minister of the United States in London, and to the commander of the *Constitution*. (1)

Jan. 29. Notice in pursuance of the above-mentioned order having been given, the motion was renewed.

The following letter from the Minister of the United States, which had been received by the solicitors retained in the case on behalf of the Government of the United States, was read to the Court:—

Legation of the United States,
London, January 28th, 1878.

Messrs. Thomas Cooper & Co., Solicitors, &c.

Gentlemen,—The accompanying notice marked A, having been left at this Legation with the janitor after the office was closed last evening, I shall be obliged to you to instruct counsel to be present in court to-morrow morning to inform the Right Honourable the Judge of the Admiralty Court that the ship against which the warrant has been applied for by the owners, master, and crew of the steam-tug *Admiral* is the United States national ship of war *Constitution*, regularly commissioned by the Government of the United States, and that the *Constitution* at the time of the alleged salvage services was engaged in the national service of the United States for public purposes, and in pursuance of a special Act of Congress passed in that behalf.

You will please also instruct counsel to inform the judge that the so-called cargo consists of property of which the United States Government has for public purposes charged itself with the care and protection.

Under these circumstances, I, as the representative of the Government of the United States, cannot recognise that the High Court of Justice has any jurisdiction whatever in this case.

I am, respectfully yours,
John Welsh.

Jan. 27. *The Admiralty Advocate* (*Dr. Deane, Q.C.*), on behalf of her Majesty's Government. Her Majesty's Government recognise the character of the *Constitution* as a public vessel belonging to a sovereign state, and protests against the Court exercising jurisdiction.

(1) With the assent of the judge the solicitors for the plaintiffs undertook to take the requisite steps to carry out this order.

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Milward, Q.C., and *W. G. F. Phillimore*, in support of the motion. No doubt that the *Constitution* is a national ship of war of the government of a foreign sovereign state, but it has never been decided that such a ship is free from a maritime lien for salvage. Indeed, there are dicta in the recent case of *The Charkieh* (1) strongly in favour of the liability to arrest in such a case extending to all ships whether public or private. Even although the Court should decide in favour of the immunity of the *Constitution* herself from arrest, the question would still remain whether the plaintiffs have not a right to require the Court to assist them in enforcing their claim against the cargo on board. There is no evidence in the case that that cargo has ceased to belong to private individuals; and this being so, the mere fact that it has for a time been taken charge of by the United States Government cannot prevent a lien for salvage attaching which this Court must recognise. It is one thing to hold that the public ship of a friendly nation is by comity free from arrest in our ports, but it is going very much further to assert that her extra-territoriality shall in all circumstances be so complete that no civil or criminal process of the Courts of the country whose waters she has entered can be executed on board her. Suppose a British subject to be improperly confined on board of a foreign ship of war in our waters, is it to be assumed that the Courts of this country are powerless to set him at liberty? (2) Opinions of Attorney Generals of the United States, vol. i. pp. 25, 47; *The Santissima Trinidad.* (3)

[SIR ROBERT PHILLIMORE. The last-mentioned case refers to prize property. Prize property is property of a peculiar character, and has always been treated as subject to peculiar considerations.]

The very question raised in the present case, as to the liability of the owners of the cargo of a foreign national vessel of war to pay salvage, must have been decided in the case of *The Prins Frederik* (4), if the foreign government concerned there had not

(1) Law Rep. 4 A. & E. 59.

(2) Report of the Royal Commission on Fugitive Slaves, 1876, p. xxxi. (Memorandum by the Lord Chief Justice of England.)

(3) 7 Wheaton, 283.

(4) 2 Dodson, 451.

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ultimately submitted to an arbitration, and it is curious, assuming the exemption of public vessels from local jurisdiction to be really so extensive as that now claimed, that throughout the report of that case there should be found nothing either in the arguments or the observations of Lord Stowell to lead to the conclusion that the warrant which had issued in that case had been wrongly extracted. It has always been considered that the greatest encouragement should be given to shipowners to render salvage services to vessels in danger, and it cannot be to the real interest of foreign governments that no tribunal should exist before which claims for assistance rendered to foreign public ships can be brought: *The Exchange.* (1)

E. C. Clarkson, for the Minister of the United States of America. The Government of the United States have possession of the property against which the plaintiffs ask that a warrant should issue, and such property cannot be arrested without a violation of the implied undertaking under which the *Constitution* came within the jurisdiction of this country: *The Exchange.* (1) It is unnecessary to dilate upon the evils which might possibly flow from an attempt to execute the process of the Court in such a case as the present. They are indeed sufficiently obvious; for example, suppose the process of this Court for delivery of the property on board the *Constitution* should be resisted. The question, moreover, ought not to be treated as if there was no remedy to the plaintiffs except through the procedure of this Court. There is a well-known remedy open to salvors who have rendered salvage services to the ships belonging to the governments of foreign sovereign states, but that remedy is not to be found in an application to this Court. The remedy in such cases is a representation to the proper department of her Majesty's Government through whom any remuneration really due for the alleged service might be obtained.

The Admiralty Advocate. Her Majesty's Government have a right to prohibit the issue of the warrants prayed for in this case. The plaintiffs have not been able to bring forward any precedent in favour of their application; nor have they shewn any reason why the property which they ask to have arrested should be more

(1) 7 Cranch, 116.

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liable to seizure by process out of this Court than any other property of a foreign government brought into this country under the implied assent of the Crown: *Nathan* v. *Virginia.* (1)

Milward, Q.C., in reply.

Cur. adv. vult.

SIR ROBERT PHILLIMORE. On Monday last an application was made to this Court to allow a warrant to issue, and to be served upon a ship of war belonging to an independent state at amity with her Majesty. The Court directed the case to stand over, and suggested that it would be proper that notice should be given to his Excellency the Minister of the United States in this country, and also to the Secretary of State for Foreign Affairs. The Court has had reason to congratulate itself that it took that step, because the result has been that it has had the advantage of hearing the opinion of counsel on behalf of the United States Government, and also the opinions of the law officers of the Crown. Now it appears from the affidavit to lead the warrants in this case, that on the 17th of January a telegram was sent from Swanage Station to the owner of the *Admiral* at Cowes to the following effect: "American frigate *Constitution* ashore on Bollard Point. Send strongest tug immediately. Two if possible," and that the tug *Admiral* was sent in consequence; and that the ship was got off the point on which she had stranded. Afterwards the consular agent for the United States wrote to the owner of the *Admiral* as follows:—

> If you have any claim to present against the U.S. frigate *Constitution*, please put it in writing and bring it to my office as early as possible to-morrow forenoon. If you cannot come, forward it to me by return post. The ship sails soon.

In reply to this letter the owner of the *Admiral* on the 21st of January sent the following telegram. [His Lordship here read the telegram in question.] Afterwards, on the 23rd of January, the owner of the *Admiral* received a sum of 200*l.*, in recognition of the services of his vessel accompanied by the following letter. [His Lordship here read the letter of the United States Consular Agent at Portsmouth as above set out.] The owner of the *Admiral* being dissatisfied with this amount of remuneration

(1) 1 Dallas, 81, n.

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returned the 200*l.* which had been sent to him, and subsequently made the application now before the Court. The question is therefore raised whether the Court has any jurisdiction in the case. And here I must also say that the Minister of the United States of America has written a letter which has been read to the Court, and is in the following terms. [His Lordship here read the letter of the American Minister above set out.] Now, it is admitted, and, indeed, it could not be denied, that if I were to exercise the jurisdiction prayed for in this case, I should be doing that for which there is no legal ground or precedent. It is clear upon all the authorities which are to be found in the case of *The Charkieh* (1) that there is no doubt as to the general proposition that ships of war belonging to a nation with whom this country is at peace are exempt from the civil jurisdiction of this country. I have listened in vain for any peculiar circumstances to take this case out of that general proposition. It has happened to me more than once, since I have had the honour of sitting in this chair, to have been requested by foreign states to sit as arbitrator and to make an award in cases—one of collision, and two of salvage. If a similar request had been made to the Court in this case, I would have gladly undertaken the duty sought to be imposed upon it; but I have now only to consider whether there is any authority for the proposition that when a foreign state refuses to waive the privilege which it possesses, it is competent to this Court, nevertheless, to treat it as an individual, and serve civil process on its property. I am clearly of opinion that it would be very wrong and improper in me to assent to this application on the part of the owner of the steam-tug. I see no distinction in this case between refusing the warrant prayed for the ship and that for the cargo, and I refuse it equally in both cases. I think it unnecessary to go into the cases cited—*The Charkieh* (1) and other cases—because they are distinguishable from the present, inasmuch as the principal points decided in *The Charkieh* (1) were that the Khedive of Egypt was not an independent sovereign, and that his ship had been treated as a vessel of commerce and not of war. That case is materially different from the one now before the Court. It has been alleged that great hardship will ensue

(1) Law Rep. 4 A. & E. 59, 96.

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from the decision of the Court, inasmuch as it will expose foreign ships to great difficulty in future if necessity should arise for salvage services to be rendered to them. To that I must answer that it would be improper to suppose that any foreign government would not remunerate the services of salvors, taking proper means to ascertain what these services were. I have no reason to suppose that such would not be the case. Be that as it may, I have to discharge my duty, which is to say, that in the absence of precedent and principle, I cannot consent that any warrant shall issue from this Court, and I must dismiss the case.

Solicitors for plaintiffs: *Clarkson, Son, & Greenwell.*
Solicitors for the American Minister: *Cooper & Co.*

[IN THE CONSISTORY COURT OF LONDON.]

1878
Nov. 26.

HANSARD AND OTHERS *v.* THE PARISHIONERS AND INHABITANTS OF ST. MATTHEW, BETHNAL GREEN.

*Faculty—Interest—Erection of Mortuary on portion of Churchyard closed for Burials by Order in Council—*16 *Geo.* 2, *c. xxviii.*

5 PD 44

The vicar and churchwardens of a parish church petitioned the ordinary for a grant of a faculty, authorizing them to erect in a part of the parish churchyard closed for burials under Order in Council, a mortuary, portions of which would be appropriated to a post-mortem room; to rooms for holding coroner's inquests, and living rooms for the keeper of the mortuary. The grant of the faculty was opposed by a non-resident owner of freehold property in the immediate vicinity of the site of the proposed mortuary, on the ground that the proposed appropriation and use of the churchyard would be contrary to ecclesiastical law.

The Court, being of opinion that it was requisite for the health of the parish that a mortuary should be provided, and also that the churchyard was the most suitable site for its erection, decided that it had jurisdiction to grant a faculty for the erection of a mortuary on a portion of the churchyard, with a room to be appropriated to post-mortem examinations.

Observations as to what interest is sufficient to confer a locus standi on opponents in causes of faculty.

THIS was a cause of faculty promoted by the rector and churchwardens of the parish of St. Matthew, Bethnal Green, in the county of Middlesex, against the parishioners and inhabitants of the said parish of St. Matthew, Bethnal Green, in special and all others in general.

The material portions of the first seven paragraphs of the petition to lead the citation were as follows:—

1. By an Act of Parliament passed in the 16th year of the reign of King George II., intituled: "An Act to make the hamlet of Bethnal Green, in the parish of St. Dunstan, Stepney, in the county of Middlesex, a separate and distinct parish, and for erecting a parish church therein;" after reciting that the commissioners appointed for building fifty churches in and about the cities of London and Westminster, and suburbs thereof, had purchased two acres and half an acre of ground in the said hamlet for a site of a church to be built there, and a churchyard and burying ground to the same, it was enacted that it should be lawful for certain trustees, or some of them, to cause a church and steeple to be built within the said hamlet of Bethnal Green, on the ground so purchased as aforesaid, and also a house for the habitation of the minister, and that the residue of the aforesaid two acres and a half of ground should be a cemetery or burying ground for the inhabitants of the said hamlet for ever.

2. Upon these two and a half acres of ground a church was accordingly built and consecrated by the name of St. Matthew, and a minister's or a rector's house was built, and the residue of the ground was set apart and consecrated as a churchyard. The freehold of the churchyard became vested in the rector by virtue of the Act.

3. In the year 1826 a watch-house or lock-up was erected on a part of the churchyard in the south-west corner thereof. Part of the building so erected was used as a watch-house or lock-up till about the year 1844. The rest of the building was used as a fire-engine house until the necessity for such use ceased. The part previously used as a watch-house was by direction of the vestry fitted up as a house for four poor respectable inhabitants of the parish, to be nominated by the churchwardens, and has been so occupied ever since. The part previously used as a fire-engine house was by direction of the vestry rather more than a year ago converted into a temporary mortuary.

4. In the year 1860, and again in the year 1862, faculties were granted for the erection of schools on other parts of the churchyard. The schools have been built and occupied.

5. By an Order in Council dated the 8th day of August, 1853, and made under the provisions of the Act 15 & 16 Vict. c. 85, it was ordered that burials in the churchyard be discontinued after the 31st of December, 1853, and that in the vaults under the national and infant schools, and within the church they should cease at once.

6. There are in the parish about 120,000 persons, many of whom are exceedingly poor. In some parts of the parish the population is most crowded, whole families having only one or at most two rooms to live in. It is most important for the moral and for the sanitary welfare of the inhabitants that the bodies of persons dying in these crowded rooms should be removed at once to some convenient resting place, there to remain until they can be properly and decently interred.

7. It is for these reasons that a part of the building already referred to has been temporarily used as such resting place or mortuary. It is, however, far too small and inconvenient for the purpose desired. The vestry have for some time been searching for a convenient spot in the parish for the erection of a suitable

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and decent mortuary. The vestry have been unable to find a place so suitable as the site of the present watch-house, which is surrounded on two sides by streets, and on the other by the open churchyard.

The petition then set forth certain proceedings in vestry, which had taken place between the years 1872 and 1876, with regard to a proposal for providing a mortuary for the use of the parish, and after alleging that at a vestry meeting on the 20th of July, 1876, it had been resolved that the report of a committee of the vestry recommending the erection of a mortuary on the portion of the churchyard then occupied by the building known as the old watch-house should be adopted, and that advertisements in writing inviting tenders for the work incident to converting the old watch-house into a mortuary in conformity with plans prepared by the parish surveyor, should be issued, proceeded in substance as follows:—

12. Plans have accordingly been prepared for a mortuary. The plans proposed to form a mortuary to contain twenty-five coffins, and a room for post-mortem examinations, which is a necessary accompaniment for such a mortuary, on the ground floor; rooms for the coroner and for the purpose of holding inquests on the first floor; and living rooms for the keeper of the mortuary on the second floor. These plans have been approved by the lord bishop of the diocese who is also patron of the benefice.

13. For the purpose of carrying out these plans it will be necessary to use, not only the site of the present watch-house, but also a further portion of the churchyard to the extent, namely, of eleven feet in an easterly direction.

The rooms for the coroner and for the purpose of holding inquests will not, however, be over any of the further portion of the churchyard.

14. There are no tombstones, graves, or vaults, in this further portion of the churchyard, or which will be affected by the carrying out of the proposed plans.

Your petitioners are not aware that there are any coffins or bodies in this further portion of the churchyard, and if any such be found, from the manner in which the substructure of the building will be constructed it will probably not be necessary to remove them. If, however, it should be necessary to move any such coffins or bodies, your petitioners undertake that they shall be taken care of, and decently re-interred in some other part of the churchyard.

The petition concluded with a prayer that the Court would, inter alia, decree a faculty authorizing the vestry of the parish to erect the mortuary as proposed.

A citation with intimation having been duly served, appearances were entered, on the 14th of May, on behalf of Mr. Henry Merceron and Mr. Arthur Wilson, whose proctors, on the 19th of

July, 1877, brought in an answer, of which the first, second, and third articles were in terms, so far as material, as follows:—

The said Henry Merceron and Arthur Wilson are both of them inhabitants and parishioners of the said parish of St. Matthew, Bethnal Green.

2. The said Henry Merceron is the owner of a large number of houses in the said parish of St. Matthew, Bethnal Green, which are inhabited by numerous tenants and sub-tenants of very poor circumstances, and he himself occupies a portion of such property. The said Arthur Wilson is the lessee of a considerable number of houses, which are also occupied by numerous tenants in very poor circumstances, and is rated as occupier of many of such houses. He is also in actual occupation of some parts of his property in the said parish. Many of the inhabitants of the parish, and particularly those living near the churchyard, are strongly opposed to the use of the churchyard for the purpose of the said mortuary, and more convenient and useful sites could be found without difficulty in other parts of the parish.

The 4th paragraph of the answer contained allegations objecting to the grant of the proposed faculty, on the grounds, inter alia, that the erection of the same as proposed would be an appropriation and use of consecrated ground for secular purposes; that such appropriation and use for secular purposes would be contrary to the provisions of 16 Geo. 2, c. xxviii.; that the unauthorized and illegal use of parts of the churchyard for secular purposes without a faculty had not divested such parts of the churchyard of their consecrated character, nor rendered the said Act of Parliament inapplicable to them; that it would be impossible for the mortuary to be erected on the proposed site without disturbing any graves and human remains there contained; and that the said mortuary and the dead bodies to be deposited there would be a nuisance to the inhabitants of the houses near the mortuary, and injurious to them.

The proctors for the petitioners filed a reply, alleging that the said Henry Merceron and Arthur Wilson were not parishioners and inhabitants of the parish of St. Matthew, Bethnal Green; that the said Arthur Wilson was not rated as the occupier of any house, and was not in actual occupation of any property in the parish; and that the said Henry Merceron and Arthur Wilson had no interest to entitle them to oppose the grant of the faculty prayed for. The reply further denied the principal allegations of facts in the 4th paragraph of the answer, and submitted to the judgment of the Court upon the several objections raised therein.

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Jan. 10, 1878. The cause came on for hearing. The hearing was continued on the 14th and 28th of January. The evidence in the case was given partly on affidavit and partly by witnesses orally examined in Court. The result thereof is fully stated in the judgment.

Dr. Spinks, Q.C., and *W. G. F. Phillimore*, for the petitioners. The opponents have not shewn a sufficient interest to entitle them to be heard in opposition to the grant of the faculty prayed for. They are neither resident parishioners nor ratepayers of the parish of St. Matthew, and they have not been able to prove that they have any rights of property in the churchyard which would be interfered with by the erection of the proposed mortuary, or that such mortuary, when erected, would be a nuisance to them or the tenants on their property. They ought, therefore, to be dismissed from the suit: *Fagg* v. *Lee* (1); *Ray* v. *Sherwood*. (2) A faculty for the erection of a mortuary on a portion of a disused churchyard is a faculty which an ecclesiastical court has jurisdiction to grant; and in fact faculties for such a purpose have, in the absence of opposition, been granted by this Court: *In re St. Leonard's, Shoreditch*. (3) When it is remembered that what is known as a mortuary is no more than a place where the dead may be placed temporarily before burial, it becomes obvious that the erection of such a building is no more a conversion of the ground on which it may be built to secular purposes than the erection of a burial vault would be. Moreover, since the passing of the statutes, under the provisions of which churchyards may be legally closed for burial (16 & 17 Vict. c. 134; 18 & 19 Vict. c. 128), the considerations which formerly prevailed against the appropriation of any portion of a churchyard for other purposes than interments no longer have the same force. Thus, in the Harwich faculty case, *In re Bettison* (4), the Dean of Arches sanctioned the erection of a school-house in a disused portion of a parish churchyard closed for burials. If the Court has jurisdiction to grant the faculty, this is eminently a case where a discretion ought

(1) Law Rep. 4 A. & E. 135; 6 P. C. 38.
(2) 1 Curt. 173.
(3) Cons. 18 Aug. 1875.
(4) Law Rep. 4 A. & E. 294.

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to be exercised in favour of the petitioners. The parish is very large; a mortuary is much needed on sanitary grounds, and the proposed site is the most convenient site that could be procured by the vestry.

[They also referred to *Ex parte Rector of Liverpool* (1) and *Ex parte Rector of St. Martin's, Birmingham.* (2)]

Locock Webb, Q.C., and *Droop*, for the respondents. Resident parishioners or ratepayers are not necessarily the only persons who have a legal right to oppose in causes of faculty, and the decision in the case of *Fagg* v. *Lee* (3), where under peculiar circumstances it was said that the status which would have given a sufficient interest to the promovent in that suit would have been the status of a parishioner, can scarcely be treated as laying down a general principle applicable to all cases. In the present case both the respondents are admittedly the owners of property in the parish, and such property might, according to the evidence, be injuriously affected if the faculty asked should be granted. This circumstance, would alone, without going into the question whether they are occupiers, either by themselves or their agents, of a portion of such property, give them a locus standi to be heard against the faculty issuing: Oughton Ordo Judiciorum, vol. ii. pp. 394, 409. Assuming, however, that the Court should be of opinion that the only persons entitled to oppose are parishioners or inhabitants, yet there are authorities to shew that the present opponents have the interest required: *Attorney General* v. *Parker.* (4) In fact, the result of the authorities seems to be that within the terms "parishioners" and "inhabitants" may be included all persons having property in the parish liable to burdens: *Attorney General* v. *Forster* (5); *Jeffries' Case* (6); *Rex* v. *Poynder* (7); *Rex* v. *Adlard* (8); *Etherington* v. *Wilson.* (9)

If the respondents have a sufficient interest entitling them to be heard, the next question for the decision of the Court is whether, having regard to the provisions of 16 Geo. 2, c. xxviii. requiring that the churchyard shall be kept as a cemetery for the use of the

(1) Law Rep. 11 Eq. 15.
(2) Law Rep. 11 Eq. 23.
(3) Law Rep. 6 P. C. 38.
(4) 3 Atk. 576.
(5) 10 Ves. 335.
(6) 5 Co. 67a; 2 Inst. 702.
(7) 1 B. & C. 178.
(8) 4 B & C. 772.
(9) 1 Ch. D. 160, 167.

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inhabitants for ever, a statutory trust has not been created, which it is not competent for this Court to vary: *In re St. Pancras Burial Ground* (1); *Moreland* v. *Richardson.* (2)

[DR. TRISTRAM. In the 42nd section of the Act there is an express saving of the jurisdiction of the ordinary.]

Leaving out of consideration the provisions of 16 Geo. 2, c. xxviii. the Court had no jurisdiction, before the passing of the recent Acts under which parish churchyards can be closed for burials, to grant a faculty for the erection in a churchyard of any building which would not be used mainly for ecclesiastical purposes: *Campbell* v. *Parishioners of Paddington* (3); *Reg.* v. *Twiss* (4); and the language of those Acts, with respect to the maintenance and preservation of churchyards in which burials have been discontinued, clearly shews the intention of the legislature that churchyards, although closed for burials, should not thereby become liable to be appropriated for secular purposes: (24 & 25 Vict. c. 61, s. 21; 18 & 19 Vict. c. 128, s. 18). In the case of *In re Bettison* (5) special circumstances existed, and no opposition was made to the faculty being granted; so also all the cases in which this Court has granted faculties for the erection of mortuaries have been unopposed cases. The question, therefore, whether the erection in a churchyard of a building to be used simply as a mortuary is the erection of a building for secular purposes, must still be considered as open. The coroner's courts which the petitioners propose should be held in the mortuary are clearly temporal courts: 7 Geo. 4, c. 64; 6 & 7 Wm. 4, c. 89; 7 Wm. 4, c. 68; and are clearly forbidden by the 88th canon of the canons of 1603, and by the earlier canons of Archbishop Langton: Johnson's Ecclesiastical Laws, Mccxxii. 9; Cardwell's Synodalia, vol. i. p. 214, ed. 1842; *More* v. *More* (6); *Middleton* v. *Crofts* (7); Lyndewode Provinciale, edit. Oxon, p. 270. The use of a portion of the mortuary as a post-mortem examination room is also undoubtedly a use of a churchyard for secular purposes. Lastly, the Court in its discretion will consider it

(1) Law Rep. 3 Eq. 173.
(2) 24 Beav. 33.
(3) 2 Rob. Ecc. 558.
(4) Law Rep. 4 Q. B. 407.
(5) Law Rep. 4 A. & E. 294.
(6) 2 Atk. 157.
(7) 2 Atk. 650.

inexpedient that a mortuary should be erected on any portion of the churchyard. [Reference was also made to the following authorities: *Bishop of St. David's* v. *Lucy* (1); *Miller* v. *Bloomfield* (2); Lumley's Public Health, p. 113.]

Dr. Spinks, Q.C., in reply. The petitioners are willing to withdraw so much of their application as relates to an appropriation of a portion of the mortuary to rooms for the mortuary keeper. With regard to the proposed rooms for the coroner and for holding coroner's inquests, such rooms would be convenient accessories to the mortuary, and their use for the purposes proposed would not contravene the 88th canon, the intention of that canon being only to forbid the holding in open churchyards of courts at which sentence of death might be given.

Cur. adv. vult.

April 15. DR. TRISTRAM. In this case the rector and churchwardens of the parish of St. Matthew, Bethnal Green, have petitioned for a faculty authorizing the erection of a building at the south-west corner of the parish churchyard—the ground-floor to be appropriated as a mortuary and post-mortem examination-room, the first floor as an inquest-room and for the use of the coroner, and the second floor as living-rooms for the keeper of the mortuary. The grounds of the application are, that it is essential for the sanitary welfare of the parish that it should have a mortuary, and that owing to the crowded state of its buildings the vestry have been unable to procure any other site suitable for that purpose.

The granting of the faculty is opposed by Mr. Henry Merceron, a gentleman who is not an actual resident in the parish, but who is possessed of considerable freehold household property in it, including houses in the neighbourhood of the churchyard, and whose family settled in this parish on the revocation of the Edict of Nantes, and have ever since continued their connection with it, and by Mr. Arthur Wilson, a builder, who is also possessed of considerable household property in the parish.

These gentlemen have filed an answer to the petition, stating several objections to the granting of the faculty, and to these

(1) 1 Ld. Raym. 447, 449. (2) 2 Add. 30.

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objections I will advert hereafter. The petitioners in their reply object to the right of the defendants to be heard in opposition to the faculty, on the ground that they are neither inhabitants of the parish nor parishioners. Affidavits were filed by the respective parties in support of the cases set up in their pleadings, and several of the witnesses were cross-examined on their affidavits, and were also examined by the Court. The first question for the determination of the Court is, whether the respondents, or either of them, have a locus standi to oppose this faculty.

It was argued by the counsel for the petitioners that to give a person a locus standi to oppose the granting of this faculty, he should either be a resident in the parish, or at least a ratepayer; that Mr. Merceron and Mr. Wilson, according to the evidence, had at the present time no such status, and several cases were cited in support of this contention, including that of *Lee* v. *Fagg and Mummery* (1), the latest decision on the question of interest.

The result of the decisions appears to come to this, that to entitle a person to oppose the granting of a faculty he must shew some interest in the subject-matter of the application. In some cases the interest required will be that of a resident parishioner or a ratepayer; in others it may be of a different description. Take for example an application for a faculty, involving (amongst other things) the removal of a family-vault. It cannot be contended that the representative of the family for whose use the vault was granted, would be disqualified from appearing on the application to protect his interest in the vault, by reason of his being neither a resident nor a ratepayer in the parish. The true test of interest in a case of this nature may be, whether the building in question may by possibility be injurious to any person as the owner or occupier of property in the neighbourhood, and if it be shewn that it might become so, I think that this would give a locus standi to such owner or occupier, whether he be or be not a resident or ratepayer in the parish, to oppose the faculty. In the present case, independently of any general interest Mr. Merceron or Mr. Wilson may have with a view to the protection of the tenants present or future of their property, Mr. Merceron is owner of certain houses in Fuller Street. These houses form part

(1) Law Rep. 6 P. C. 38.

of a small block of houses, the front houses of the block being in Church Row, immediately opposite to, and about thirty-two feet from, the proposed building. As one of the purposes of the mortuary is the reception of bodies of persons who have died from infectious diseases, and as Mr. Merceron's houses in Fuller Street are just at the back of, and in close connection with, the houses in Church Row, and not more than seventy yards from the site of the proposed building, it occurred to me, especially on inspection, that on this ground, if not on any other, the Court ought not to hold that Mr. Merceron was without a possible interest in this suit; for if, whether owing to the close proximity of the mortuary, or to want of proper precautions, infection was to spread from the mortuary to the houses in Church Row, this might be injurious to Mr. Merceron's houses in Fuller Street.

I will now proceed to consider the objections taken by the counsel of the respondents to the issuing of the faculty prayed. It was said that the appropriation of a portion of the churchyard for any of the purposes named is contrary to law, as being the appropriation of consecrated ground for secular purposes. It appears to the Court, for reasons which I will presently state, that this objection has force in reference to that part of the application which relates to the erection of rooms for the holding of coroner's inquests, and for living rooms for the keeper of the mortuary, but not to the erection of the mortuary itself, which was aptly expressed by Dr. Spinks to differ only from a vault or a grave in being a temporary instead of a permanent resting-place for the dead. It cannot with accuracy, I think, be said that the appropriation of a small portion of the churchyard, for the use of the parish for such a purpose, is an illegal diversion of the ground from parochial and ecclesiastical purposes to secular purposes.

In many churchyards there may be seen small erections for this purpose, and since the closing of the London churchyards for ordinary burials, several faculties have within the last twenty years been granted by this Court for the erection of mortuaries in churchyards for the use of the parishioners, and I can see no reason on principle for the Court departing from those precedents in cases where it is satisfied, that it is essential for the health of

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the parish that it should have a mortuary, and that the churchyard is a convenient site for it. It was further argued for the defendants, that assuming the Court to have jurisdiction to grant a faculty for the erection of a mortuary in an ordinary churchyard, yet that in this particular instance it was precluded by the terms of 16 Geo. 2, cap. xxviii., a private Act of Parliament, constituting the hamlet of Bethnal Green into a separate parish to be called St. Matthew, Bethnal Green. In 1741, the date of the Act in question, it was necessary by the then state of the law to obtain an Act of Parliament to authorize the erection of a new parish, and for this purpose the Act referred to was passed. It contains, as might be expected, a provision relating to the churchyard, and provides in the same, or similar terms, to be found in an ordinary deed of conveyance of land intended for a churchyard :—

"That the piece of ground then set apart for and forming the present churchyard should be a cemetery or burial ground for the inhabitants of the said hamlet for ever."

This ground was subsequently consecrated, and thereby became subject to the jurisdiction of this Court, and the 42nd section of the Act, provides,

"That neither this Act or anything therein contained is intended or shall extend to invalidate any ecclesiastical law or constitution of the Church of England, or to destroy any of the rights or powers belonging to the Bishop of London and his successors, or any other local ordinary, or to any archdeacon, chancellor, or official,"

and the 43rd section provides,

"That the Bishop of London, and all other ecclesiastical ordinaries and judges, and their successors respectively, shall thereafter exercise ecclesiastical jurisdiction in the said new parish as amply as they, or any of them, may now do in the said parish of Stepney"

(being the parish out of which St. Matthew, Bethnal Green, was taken)

"in case this Act had not been made."

These last words would seem to contemplate that this churchyard was to be placed in the same position in reference to the jurisdiction of this Court as the churchyard of Stepney or any other parish.

Other objections taken were that the position of the churchyard

was unsuited for a parochial mortuary in consequence of its being situated at one end (the west end) instead of in a central part of the parish, the inconvenience of access to it, and further (and to this a great portion of the evidence and argument were directed), that the mortuary would, from its close proximity, be a nuisance to the inhabitants of the houses near the churchyard and injurious to their health. It appeared to the Court that both these objections were entitled to serious consideration.

The proposal for the erection of a mortuary in this churchyard was first made by the vestry in the year 1872, and was then strenuously resisted by Mr. Hansard, the rector of the parish, supported by a considerable number of the parishioners, on the ground of the inconvenience of the site and the supposed possibility of obtaining a more convenient site elsewhere in the parish.

The vestry, in consequence of this opposition, for the time abandoned the project and made application (but without success) to the poor law guardians and to the commissioners of crown lands, for sites in the parish; other suggested sites were inspected by a committee of the vestry, whose report was unfavourable to their selection. The vestry, having taken into consideration the report of their committee, came to the conclusion (in the correctness of which, having myself inspected the sites, I feel it my duty to express my concurrence,) that these several sites were all open to serious objection, and thereupon the rector was induced to join with the churchwardens and the vestry in making the present application to the Court.

The Court, before sanctioning the erection of a mortuary in this churchyard, ought, I think, to be satisfied on two points: first, that it is essential to the health of the parish that it should have a mortuary; and, secondly, that the churchyard will afford the most suitable and most available site for it in the parish. There can be no doubt that it is requisite for the health of this parish that it should have a mortuary; for it appears by the evidence that the parish contains a population of 120,000 persons composed principally of the poorer classes, that in some parts of the parish the population is most crowded, many families occupying one, or at most two, rooms only. In the case of a death in such families, it is obviously of the first importance that there

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should be some place under proper control to which the body may be at once removed there to remain until interment. Upon the second point, I have come to the conclusion, after an inspection of the churchyard and of the other suggested sites, that on the whole the churchyard is the most available and most suitable of the sites suggested for a mortuary.

To the other portions of the application objections were also urged. With regard to the erection of living rooms over the mortuary, Dr. Tidy, a gentleman of great experience in such matters, and Dr. Bale, the medical officer of the parish, in answer to questions put to them by the Court, said that there were grave objections in a sanitary point of view to this part of the plan. With regard to the erection of inquest rooms, passing over the objection grounded on the hardship of compelling juries to sit in a room over a mortuary, I will proceed to the main legal objection founded on the 88th canon, and upon the wording of that canon, which directs churchwardens "not to suffer temporal courts or leets, lay juries, musters, or any other profane uses, to be kept in the church, chapel, or churchyard," and upon consideration of the reasons upon which the provisions of the same may be supported, I think that this objection is a valid one. For if a lay court is allowed to he held in a churchyard, the control of part of the churchyard would be necessarily, for the time being, taken from the ordinary and placed in that of the judge or president of the lay court, so that the ordinary or his officers would be without power to check disturbances that might arise in a churchyard during the holding of a coroner's inquest there. This, especially during the time of divine service, would be extremely inconvenient, and might occasion scandal.

The Court has therefore come to the conclusion that it ought to reject so much of the application as relates to the erection of the coroner's and living rooms over the mortuary. It has also come to the conclusion that the proximity of the site of the proposed mortuary to the houses in Wood's Close, and particularly to some of those in Church Row, is warranted neither by necessity nor convenience. It occurred to me, especially on inspecting the churchyard and adjoining neighbourhood, that the distance of only thirty-two feet between some of the houses in Church Row and

the entrance to the mortuary, where bodies of persons who have died from infectious complaints are to be taken, is objectionable, and, as the surveyor stated in his evidence, that the mortuary might at no great increase of expense and without detriment to the rectory house be placed fifty feet back from the road on either side, I think it would be desirable that there should be this alteration in the plan. The Court will therefore be prepared to grant a faculty for the erection of a mortuary in two compartments, one for the reception of infectious cases and the other of non-infectious cases at the distance from the roads indicated, together with a post-mortem room, which is incident, and a convenient accessory to a mortuary.

In consequence of a portion of the plan having been rejected it would, I think, be desirable that the plan should be reconsidered by the vestry. The course I propose to take is to make an order which will enable the plan to be reconsidered by the vestry, and I would suggest that any new plan should be framed with a view to the future enlargement of the mortuary.

There remains the question of costs, which is in the discretion of the Court. In the present case Mr. Merceron and Mr. Wilson have succeeded on some very important issues raised by the application of the rector and churchwardens, and, without intending to reflect any censure on the petitioners or on the vestry, who, I think, have done no more than they were bound to do, having due regard to the welfare of the parish, I give the respondents as against the petitioners the costs of those issues on which they have been successful. They are not entitled to the costs of the issues on which they have been unsuccessful.

The case may stand over if desired for further order. (1)

(1) The minute of the decree as entered on the registry was so far as material substantially as follows:—

The judge having heretofore heard counsel and proctors on both sides and deliberated thereon, and having personally inspected the churchyard and the adjoining neighbourhood, as well as the sites suggested by the defendants for the erection of the proposed mortuary, declared that the Court would be prepared to grant a faculty for the erection of a mortuary in two separate compartments one for the reception of bodies dying from infectious complaints, and the other for the reception of bodies dying from non-infectious complaints, together with a post-mortem room in the churchyard of the parish of St. Matthew, Bethnal Green, provided such mortuary be placed back fifty-feet or thereabouts, but not less than forty-five

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Nov. 26. The proctors for the petitioners brought into the registry an amended plan showing the site on which, having regard to the decision of the Court, the petitioners proposed that the mortuary should be erected.

Proctors for petitioners: *Pritchard & Sons.*
Proctors for respondents: *Moore & Currey.*

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Dec. 18.

NOAKES *v.* NOAKES AND HILL.

Settlements—Injunction to restrain dealing with the Property.

A petitioner had obtained a decree nisi for dissolution of his marriage. Before an order could be obtained to vary the post-nuptial settlement, the respondent was about to sell or otherwise dispose of some of the property. The Court granted an injunction to restrain her from dealing with it.

THIS was an application for an injunction. On the 30th of June, 1877, the petitioner obtained a decree nisi for dissolution of his marriage by reason of the respondent's adultery. There had been a post-nuptial settlement in favour of the respondent, which the petitioner was desirous should be varied, but the proper time for obtaining an order to that effect had not arrived, viz., when the decree would be made absolute.

Bargrave Deane, on an affidavit that the respondent was about to sell the property included in the settlement, moved for an injunction. He referred to the Judicature Act, 1873, s. 25, sub-s. 8, and Order LII., rule 4.

THE PRESIDENT. Let an injunction issue to restrain the

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feet, from the road on either side, but rejected so much of the application of Pritchard's parties for the faculty as applied to the erection of such mortuary upon the site proposed, and to the erection of coroner's and living rooms over the mortuary, and gave Moore's parties their costs on the issues on which they had been successful, and adjourned the further consideration of the case in order that a fresh plan might be submitted to the vestry and to the further consideration of the Court.

respondent from dealing with any property which she may claim under this alleged settlement, and ordering, if the sale of the property should have taken place, that she bring into court the money received from such sale.

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NOAKES v. NOAKES.

Solicitors for petitioner: *Clennel & Fraser.*

Solicitors for respondent and co-respondent: *Nash & Field.*

LAWFORD (OTHERWISE DAVIES) *v.* DAVIES.

1878

Feb. 19.

Nullity—Irregular Marriage in Scotland—Twenty-one Days' Residence in Scotland—Mode of Computation.

Two persons domiciled in England arrived in Scotland about 4 A.M. of the 1st of July, 1870, remained there until the 21st following, and between 11 and 12 A.M. of that day contracted a marriage by declaration before a registrar:—

Held, that they had not lived in Scotland for twenty-one days next preceding the marriage, and that therefore it was invalid.

THIS was a petition for a declaration of nullity of marriage by reason of informality.

The petitioner Miss Lawford, and John Augustus Jackson Davies, intending to contract a clandestine marriage, left London for Scotland by the train which was timed to pass Berwick-upon-Tweed at 4 A.M. of the 1st of July, 1870, and they arrived at Edinburgh about 6 A.M. of that day. After remaining in Scotland until the 21st of July following, they between 11 and 12 o'clock A.M. of that day contracted a marriage by declaration before the registrar at No. 51, Cockburn Street, Edinburgh. The petitioner prayed for a declaration of nullity of marriage, on the ground that the parties, being at the time domiciled in England, had not lived in Scotland for twenty-one days next preceding the marriage. (1)

The respondent appeared in the suit, but filed no answer.

(1) 19 & 20 Vict. c. 96, s. 1.:— "After the thirty-first day of December, 1856, no irregular marriage contracted in Scotland, by declaration, acknowledgement, or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom, or usage to the contrary notwithstanding."

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Dr. Spinks, Q.C., and *Dr. Tristram*, appeared for the petitioner.

The evidence as to the facts was taken when the case was adjourned for proof of the Scotch law.

Mr. John Blair Balfour, an advocate of the Scotch Bar, was called to prove the law of Scotland applicable to the case.

There had been, he said, no judicial decision upon the statute, but by analogy from the law in other cases, the requisite twenty-one days had not been completed. In Bell's Commentaries, vol. ii. p. 178 (5th ed.), the law is thus stated: "1. By a decision of the House of Lords, confirmed in subsequent cases in the Court of Sessions, the settled rule for computing the period of death-bed deeds" (made sixty days before the grantor's death) "is that the terminus a quo, the day or date of the deed, must be excluded, and the sixty days reckoned independently of it. 2. The day does not run from noon to noon (as it does in navigation reckoning), but consistently with the common understanding of the country, from midnight to midnight. The sixty days are in a case of bankruptcy, precisely as in the case of a death-bed, to be held as exclusive of the day on which the deed is made, and as expiring the moment the sixtieth day from the bankruptcy begins, according to the maxim 'dies inceptus pro completo habetur.'" According to this rule of computation, the parties had lived in Scotland only nineteen days and two half-days before the marriage, which is therefore invalid.

Mr. Wm. McIntosh, of the Scotch Bar, who was also called as a witness, was of the same opinion.

THE PRESIDENT. This being a matter depending upon the construction of a statute dealing with marriages in Scotland, the evidence of Scotch lawyers is properly admissible. I see no reason why I should not act upon Mr. Balfour's statement of the law, which is exceedingly clear, and I therefore find that the parties had not lived in Scotland for twenty-one days next preceding the marriage, and that therefore the marriage is invalid.

Decree nisi for nullity of marriage, with costs.

Solicitors for petitioner: *Lawford & Waterhouse.*

FIREBRACE *v.* FIREBRACE. 1878

March 26.

Restitution of Conjugal Rights—Respondent abroad—Jurisdiction—Service of Proceedings.

A wife's remedy for matrimonial wrongs must be usually sought in the place of her husband's domicil.

The English Divorce Court has not jurisdiction against a foreigner, after he has quitted this country, for not rendering conjugal rights to his wife while he was here.

The provisions of the 42nd section of 20 & 21 Vict. c. 85 (for service out of her Majesty's dominions) do not apply to suits for restitution of conjugal rights.

THIS was a suit for restitution of conjugal rights, and raised various questions as to the jurisdiction of the Court. The facts are fully stated in the judgment.

Henry Matthews, Q.C. (*Searle,* with him), appeared for the petitioner.

Dr. Spinks, Q.C. (*Gorst, Q.C.,* and *Bayford,* with him), for the respondent.

THE PRESIDENT. This suit, by Isabella Firebrace against her husband, Robert Firebrace, was commenced on the 9th of February, 1872, for restitution of conjugal rights. The respondent appeared under protest, and afterwards by act on petition submitted to the Court that it had no power to entertain the suit, or to make any order thereon, on the ground that he had left England before its institution, and that from the time of so leaving England he had been out of the jurisdiction of the Court, and had no home or place of abode within its jurisdiction, and that the Court had no power to order its process to be served on the respondent personally or otherwise, and therefore prayed that the said petition should be dismissed.

The argument of the case has been from time to time postponed at the request of the parties, and I had hoped that the decision of the Court would not be called for; but as I am informed that no settlement has been come to, I am requested to give my judgment, which I accordingly now proceed to do.

The material facts of the case are these. The respondent's

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father, William Firebrace, was a native of Barbadoes, and held a commission, first in a West Indian regiment and afterwards in the 58th regiment of the line. The said William Firebrace accompanied his regiment to various places in England, Ceylon, and Scotland, down to 1841, when he retired from the service and at once proceeded to Australia, where he settled, taking with him his wife and family, including the respondent, who had been born in 1828, at Newport, in the Isle of Wight. The said William Firebrace never had an English domicil, and he retained his domicil of origin until he acquired a domicil of choice in Australia, which he retained until his death in 1856. From the time when the respondent accompanied his father and mother to Australia in 1841, he remained there assisting his father in his business and afterwards carrying on business for himself until 1866, with the exception of a short visit to England in 1856.

The first question discussed before me was the domicil of the respondent. It appears to me clear, upon the facts above stated, that down to 1866 the respondent's domicil was Australian, derived, in the first instance, from his having as a minor acquired the domicil chosen by his father, and continued by his own act in establishing himself in the colony.

A more difficult question arises as to the effect of his coming to England in 1866. He had married the present petitioner in 1858 at Melbourne, she being a native of the colony and domiciled there. He alleges that he came to England temporarily for the benefit of his health, which had suffered from a recent accident, and that he at first proposed to leave his wife in Australia during his absence, but that he subsequently determined to bring her with him, thinking that change of scene and society might enable her to shake off habits of intemperance which he states she had contracted. From the time of his arrival in England in July, 1866, down to the time of his leaving in 1872, the respondent never had any permanent abode in this country, but resided in hotels, furnished apartments, and houses taken for short terms of a few months only. He alleges that during the whole time he looked upon Australia as his home, where he still continues to hold property, never having held any property in England except money at his bankers and a few shares of trifling value in joint

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stock companies. He further alleges that as his health grew stronger he thought of returning to Australia, and in August, 1868, formed the determination, of which his wife was aware, of leaving England as soon as it could be conveniently arranged to return to Australia, and that it was only in consequence of facts coming to his knowledge, upon which he instituted a suit for dissolution of his marriage on the ground of his wife's adultery, that he abandoned his intention to return to Australia at that time. That suit was commenced in May, 1869, and was heard in 1872, during which time the respondent was obliged to come from Scotland and reside in England, for the purpose of complying with an order of this Court which the petitioner had obtained that she should have access to her children, and that they should not be removed from the jurisdiction. The petitioner, on the other hand, alleges that her husband before leaving Australia sold his property there, and came to England intending to reside there permanently. She further says that on several occasions the respondent has spoken to her about purchasing an estate in England; that after their return to England, and whilst they were living at Tunbridge Wells, he took her to see an estate in the neighbourhood consisting of an old house and some land, and that he expressed his intention, if he purchased the property, of rebuilding the house, and that after some discussion he determined not to make the purchase. The mother of the respondent has made an affidavit in the case, and states that her son came for a time to England in 1866 in consequence of an accident he had received, but that she never heard him say, nor does she believe it to be the fact, that he ever contemplated remaining permanently in England; on the contrary, she has often heard him say that he wished and intended, as soon as he prudently could do so, to return to Australia, all his property being there.

Upon a consideration of the evidence on the one side and on the other, I come to the conclusion that it is not established that the respondent ever abandoned his Australian domicil and acquired an English domicil. In the first place, as I have already stated, it appears to me clear that the domicil of the respondent's father was never English. It was first West Indian, and, secondly, Australian. His taking service in the British army in no way

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affected his domicil. Secondly, the fact that the respondent was born in England does not affect his domicil, the domicil of the child being that of the father at the time of the child's birth. These propositions were involved in the decision of the House of Lords in *Udny* v. *Udny*. (1) It follows, therefore, that the respondent did not by coming to England in 1866 acquire an English domicil, unless it was his intention to do so. If he intended to abandon his Australian domicil of choice without a fixed intention of acquiring another, his domicil of origin would revive, and that was West Indian, not English. But in fact there is nothing which shews that he had abandoned his Australian domicil. The bulk of his property remains in Australia, and as against his own statement and that of his mother that he always intended to return thither, there is nothing but the wife's statement that on some occasions he contemplated, but never carried out, the purchase of property in England. The wandering life which he led down to the time of his instituting his suit against his wife strongly confirms his contention that he never intended to acquire an English domicil. Further, it appears that he left England with his children immediately after his suit was commenced, and only returned under compulsion, and finally, on the conclusion of that suit, and before the present suit was commenced, he quitted this country, and has never since returned. Even supposing, therefore, that he ever did contemplate acquiring an English domicil, he abandoned it before the commencement of this suit; and that abandonment will not be the less operative because his motive was to avoid the liability to proceedings in this Court. I find, however, as a fact that he never did acquire an English domicil.

This being so, the case of *Yelverton* v. *Yelverton* (2) is a direct authority on the question now before the Court. There Sir Cresswell Cresswell says: "This is a Court for England, not for the United Kingdom, or for Great Britain, and, for the purpose of this question of jurisdiction, Ireland and Scotland" (and I may add the colonies), "are to be deemed foreign countries equally with France or Spain. If this be so, this is a suit against a

(1) Law Rep. 1 H. L., Sc. 441.
(2) 1 Sw. & Tr. 586; S. C. 29 L. J. (P. M. & A.) 40.

foreigner who is not and was not at the commencement of this suit within the kingdom of England, who never had any residence in England" (by which, as the context shews, the learned judge meant other than a temporary one), "who never owed obedience to the laws of England, except during the period of his temporary sojourn here, and who is not said to have done anything in England contrary to those laws."

This passage is literally applicable in all respects to the present case, but it may be said that the facts shew that the respondent has done something contrary to the English law by refusing while in England to render his wife conjugal rights, and I will deal with the point as if this had been stated in the petition.

In the first place, although Sir Creswell Cresswell alludes to the absence of any allegation of any past breach of English law as a fact in the case, the authorities he cites do not advert to that circumstance as being of importance. And the learned judge sums up the effect of the authorities thus: "Unless some ground can be discovered for saying that Major Yelverton was domiciled in England according to the law as laid down by Lord Lyndhurst, by Boullenois, and by Story, he was not subject to the jurisdiction of this Court." Thus shewing that he rests his judgment on the want of an English domicil in Major Yelverton. No decision has been brought to my notice where the jurisdiction of this Court has been asserted against a foreigner after he had quitted this country for not rendering conjugal rights to his wife while here; and it appears to me that the Court has not jurisdiction in such a case.

The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicil. It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident though not domiciled. What these cases may be, it is unnecessary now to determine, and I abstain from discussing this question, as I believe it will shortly be raised before me in another case now pending; but it appears to me that the particular relief now sought by decree for restitution of conjugal rights does not, where the husband had quitted the jurisdiction before suit, present an exception to the rule above stated. In such a suit the wife

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does not seek a remedy by a change in her own status or right. In suits for divorce and judicial separation the primary object is to free the wife in whole or in part from the obligation of marriage. In a suit for restitution of conjugal rights the primary object is to control the husband. She asks that her husband shall in the future be compelled by the process of the Court to take her back to live with him in a common home. In other words, she prays that the English law shall be put in force against him, but as the obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction, the tribunals of this country cannot call upon him to obey those laws after the obligation has ceased.

The difficulty, amounting in most cases to an impossibility, of enforcing the decree of the Court in the circumstances of the present case lends additional force to the arguments against the existence of the jurisdiction. Suppose the case of a citizen of the United States deserting his wife while in England and returning to his own country where a suit for restitution of conjugal rights cannot be maintained. It is obvious that he could not be required to return to his wife in this country. All that he could be called upon to do would be to receive her in his own. The Court must necessarily be powerless in most cases to enforce such a decree. And even if the remedy by sequestration of the property of the husband could be resorted to, it would be a singular anomaly that this Court should by this or other process endeavour to compel him to observe in his own country a course of conduct which he could not by the laws of that country be called upon to adopt. For these reasons, as well as upon the authority of *Yelverton* v. *Yelverton* (1), I am of opinion that this suit cannot be maintained.

It is to be observed that in *Yelverton* v. *Yelverton* (1) Sir Cresswell Cresswell entered into an elaborate investigation of the question whether the petition in a suit for restitution of conjugal rights could be served out of the jurisdiction, and he gives his reasons (based on the nature of the jurisdiction of the Ecclesiastical Courts to which suits of this kind formerly belonged) for holding that it could not be so served unless the respondent had a residence in England; but he appears to have assumed that the

(1) 1 Sw. & Tr. 586; S. C. 29 L. J. (P. M. & A.) p. 40.

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42nd section of 20 & 21 Vict. c. 85, authorized service abroad of a petition for restitution of conjugal rights where the Court has jurisdiction to entertain the suit. His attention does not appear to have been called to the fact that the 42nd section speaks only of such petitions, which by reference to the 41st section will be seen to be a petition in a suit either for a decree of nullity, judicial separation, dissolution of marriage, or jactitation of marriage, and not a petition for restitution of conjugal rights. Whether this was intentional, as has been contended before me, or accidental, I cannot take upon myself to say, but the fact remains that no power is given by the Act to serve such a petition out of the jurisdiction. Whether any proceeding like that by "ways and means" of the Ecclesiastical Court could be resorted to may be open to question. The effect of the 42nd section, however, does not appear to me of importance in the present case, as I think it clear that it does not extend the jurisdiction of this Court as to persons. It only gives to the Court where its jurisdiction already exists greater facility of serving its process. But, for the reasons I have stated, I am of opinion that this Court had not jurisdiction over Mr. Firebrace after he left this country, and, therefore, that the present suit cannot be maintained.

Solicitors for petitioner: *Simpson, Hammond, & Co.*
Solicitors for respondent: *Sladen & Mackenzie.*

SANSOM *v.* SANSOM.

1879
Jan. 14.

Costs—Alimony—Sequestration of Pension—Form of Order.

The Court in enforcing payment of alimony and costs will authorize sequestrators to receive portions of a civil service pension.

Willcock v. *Terrell* (Law Rep. 3 Ex. D. 323) followed.

THE petitioner had, in 1877, obtained a decree of judicial separation with costs, and an order for payment of permanent alimony at the rate of 139*l.* a year. The respondent had not paid any portion of the costs or alimony, and had gone to reside at Boulogne, so that it was useless to issue either a writ of attachment or execution.

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Subsequently it was discovered that in July, 1875, the respondent had been awarded a pension of 402*l.* a year for services in the legal department of the government.

An order nisi attaching this pension was accordingly made and served upon the respondent, and on the 5th of November, 1878, he having appeared before the President, and notice having been given to her Majesty's paymaster-general, the following order was made, viz.:—

"Upon hearing counsel for the petitioner, and the solicitor for the respondent, and upon reading the affidavits of . . . . I do order that the yearly pension, amounting to the sum of 402*l.* 4*s.* 5*d.*, authorized by a minute of her Majesty's Treasury, and dated . . . . and payable monthly at the office of the paymaster-general to the respondent, shall be and shall henceforth stand charged with the payment of the sum of 71*l.* 8*s.* 2*d.*, being the amount of the petitioner's costs of this suit directed to be paid pursuant to order dated . . . . and the sum of 416*l.* 5*s.* arrears of alimony ordered to be paid pursuant to an order dated . . . . And I do further order that one half of the said monthly instalments of the pension shall be paid in respect of the amount of alimony to the petitioner or to . . . ., her trustee, and in respect of the costs to . . . ., her solicitors, until the said costs and arrears of alimony now due, and in the meantime to become due, and the costs of this application, amounting to the sum of 18*l.* 12*s.* 8*d.*, shall be satisfied, and that from and after the payment of such costs and all arrears of alimony, one-third of the said monthly instalments of the pension shall be paid to the petitioner or to . . . ., her trustee, in satisfaction of the order for alimony dated . . . . And I direct the paymaster-general to pay such proportions of the said monthly instalments of the pension as they become payable to the petitioner, her trustee, or her solicitors in pursuance of this order.

"Dated this day of 1878.

"James Hannen."

Bowen, moved the Court to vary this order by omitting therefrom all direction to or order on her Majesty's paymaster-general. Such an order is ultrà vires: *Crispin* v. *Cumano.* (1)

(1) Law Rep. 1 P. & D. 622.

Ambrose, Q.C., and *Searle*, contrà, cited *Willcock* v. *Terrell.* (1)

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SANSOM v. SANSOM.

THE PRESIDENT. When I made the order complained of, I intended that it should be in accordance with the terms of the order in *Willcock* v. *Terrell* (1), and it must be varied accordingly. (2)

Solicitor for petitioners: *F. Deakin.*

Agents for the Solicitor of the Treasury: *Hare & Fell.*

YGLESIAS *v.* YGLESIAS AND SELBY.

1879 *Feb.* 11.

Settlement—No Children—Matrimonial Causes Act, 1878—*Retrospective.*

By the 3rd section of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), amending s. 5 of 22 & 23 Vict. c. 61, the Court may vary marriage settlements where there are no children of the marriage. The Court, under the circumstances of the case, *held* that the later Act was not retrospective.

Jan. 28. THIS was an application for leave to file a petition to vary a post-nuptial settlement.

On the 5th of March, 1878, the Court made a decree absolute for dissolution of the petitioner's marriage by reason of the respondent's adultery with the co-respondent. There had been no children of the marriage, and therefore under the 5th section of 22 & 23 Vict. c. 61, the Court had no jurisdiction to deal with the settlement. (3) By the 3rd section of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), "the Court may exercise the powers vested in it by the provisions of s. 5 of 22 & 23 Vict. c. 61, notwithstanding

(1) Law Rep. 3 Ex. D. 323.

(2) The order was accordingly altered as follows:—It is ordered that the said order be varied by omitting therefrom all direction to or order on her Majesty's paymaster-general to pay or cause to be paid to the said petitioner or her trustees the proportions of the pension payable to the said respondent, and that the said respondent, his solicitor, his banker, or agent, be and each of them is hereby restrained from receiving the proportions of such pension now due or hereafter to become due, and that . . . . the trustee of the said petitioner do receive the said proportions of such pension in the place and in the stead of the respondent.

(3) See *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Dempster* v. *Dempster*, 31 L. J. (P. & M.) 113; *Bird* v. *Bird*, Law Rep. 1 P. & D. 231.

†

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that there are no children of the marriage." This later Act came into operation on the 27th of May, 1878.

Pritchard, for the motion. The Act is remedial, and therefore should be construed liberally. The later Act when read with the earlier Act, may in the discretion of the Court have a retrospective operation, and the discretion given to the Court is sufficient to prevent the abuse of such a power. The present is a fit case for the exercise of that discretion, as the respondent and co-respondent have eloped together.

Cur. adv. vult.

Feb. 11. THE PRESIDENT. I have considered this application, and am of opinion that, even if there is anything in the language of the Act to justify the interpretation contended for, the Court, in the exercise of the discretion given to it by that Act, ought not to grant this motion.

Application refused.

Solicitors: *H. H. Mason & Son.*

April 3.

BRANFORD *v.* BRANFORD AND SHEPPERD, AND THE QUEEN'S PROCTOR INTERVENING.

Evidence—Communications between Attorney and Client—Privilege—Divorce.

After the trial of a petition for divorce, the Queen's Proctor intervening and charging the petitioner with adultery, counsel on behalf of the Queen's Proctor proposed to ask a solicitor who had acted for the petitioner at the former trial whether the petitioner before such trial had not confessed to him that he had been guilty of a matrimonial offence:—

Held, that the question was inadmissible, the communication being privileged.

IN this case the petitioner had obtained a decree nisi by reason of the respondent's adultery with the co-respondent, and subsequently the Queen's Proctor obtained leave to intervene, and alleged, amongst other things, that the petitioner had himself been guilty of adultery. This and the other issues raised by the Queen's Proctor came on for trial before the president and a common jury. In the course of the action, Mr. Rudland, who was

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one of the partners in the firm of solicitors who had acted for the petitioner in the former trial, was called on behalf of the Queen's Proctor, and asked whether, on the day before that trial the petitioner had made a communication to him as to his having been guilty of a matrimonial offence. The question was objected to by the petitioner's counsel.

Gorst, Q.C. (*Bargrave Deane* with him). The question is put on behalf of the Queen's Proctor, acting as a public officer, and if this were a criminal suit it would be admissible. Suits of this nature are quasi-criminal.

Inderwick, Q.C. (*Keogh* with him). The Queen's Proctor is in only the same position as one of the public. It has been decided by the House of Lords in *Mordaunt* v. *Moncreiffe* (1) that a matrimonial cause is a civil proceeding.

THE PRESIDENT. I think the point taken by the Queen's Proctor is concluded by the decision in the House of Lords that proceedings of this kind are not criminal, and if not criminal then they must be civil, for there cannot be quasi-civil or quasi-criminal cases. In civil actions the rule is well-established that in order to protect persons who are threatened with legal process, communications between them and their solicitors with reference to those matters are privileged. The evidence must therefore be rejected.

Solicitors for petitioner: *Saunders & Co.; Queen's Proctor.*

IN THE GOODS OF GRACE HASTINGS.

1877

Nov. 18.

Administration—Next of Kin—Lunatic—Grant to a Stranger.

The sole next of kin of an intestate was lunatic. Her committee renounced, and H. K. L., a stranger in blood, applied for grant of letters of administration. The Masters in Lunacy, and next of kin of the lunatic, approved of the application. The Court, upon the consents of the next of kin being filed, ordered the grant to be made to H. K. L.

GRACE HASTINGS, late of Lyndham, in the county of Oxford, died on the 20th of February, 1877, intestate, a spinster, without

(1) Law Rep. 2 H. L., Sc. 374.

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IN THE GOODS OF HASTINGS.

parent, leaving her sister, Elizabeth Hastings, her sole next of kin, and only person entitled in distribution to her personal estate. Elizabeth Hastings was of unsound mind, and Thomas Smallhorn, of Lyndham, had been appointed committee of her estate and effects.

The Masters in Chancery objected to a grant to Thomas Smallhorn, on the ground that if he were also administrator he would have to render the accounts to himself. He therefore renounced his right.

Bayford moved that the grant of administration be given to Henry Kent Lockwood. He is a stranger in blood to the deceased, but is a person in whom in her lifetime she had great confidence. Moreover, the Masters in Lunacy approve of the grant being made to him, and so do the next of kin of the lunatic.

THE PRESIDENT. The consents of the next of kin of the lunatic must be filed, and then the grant may be given to the applicant.

Solicitors: *Walters, Young, & Co.*

1878
Jan. 22.

IN THE GOODS OF WILLIAM RICHARD MAYCHELL (OTHERWISE MACHELL).

Administration—Next of Kin a Married Woman living apart from her Husband—Grant (under s. 73 of 20 & 21 Vict. c. 77) to Trustees of Marriage Settlement—Justifying Security.

SPD17

M. died intestate, leaving A. his sister sole next of kin. A. had for many years lived separate from her husband, whose address was unknown. The Court at the request of A. granted (under the 73rd section of 20 & 21 Vict. c. 77) letters of administration of the estate and effects of M. to the trustees of the marriage settlement of A., but ordered justifying security to be given.

WILLIAM RICHARD MAYCHELL (otherwise Machell), late of Croft House, Newton, in the county of Cumberland, died on the 14th of August, 1877, intestate, a bachelor without parent, leaving his sister Annie Alice Anglesmith (the wife of P. S. E. Angle-

smith) his sole next of kin and only person entitled in distribution to his personal estate and effects.

Mr. and Mrs. Anglesmith had for some years previously lived apart, and in 1873 Mr. Anglesmith left for Australia, and it was not known where he was, or whether he was dead or alive. By their marriage settlement the husband covenanted to settle all after-acquired property to her separate use for life without power of anticipation, with remainder to him for life, and remainder to the children of the marriage.

The property of the intestate consisted chiefly of shares in public companies, and as the companies might refuse to allow a transfer or sale without the consent of the husband, Mrs. Anglesmith was desirous of renouncing her right to the grant in favour of the trustees of the settlement.

Bayford, for the trustees, moved for a grant to them. They would be entitled to the residue of the intestate's estate after payment of his debts and funeral expenses: *In the Goods of Hardinge.* (1)

THE PRESIDENT. I make the grant under the 73rd section to the trustees, but as I am proceeding in the absence of the person who has an interest, though limited and subject to that of his wife, I think justifying security must be given. In saying this I assume that the facts are as stated, and that the trustees would be entitled to hold the property first for the benefit of the wife, and afterwards for the husband. The deed must be brought into the registry for examination to see that its contents are correctly stated, and the grant may then go to the trustees.

Solicitors: *Thompson, Pickering, Styan, & Neilson.*

(1) 2 Curt. 640.

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Jan. 22.

IN THE GOODS OF RULE.

Foreign Will—Probate abroad of Copy—Form of Grant in this Country.

R., domiciled in Mexico, made a will according to the law of Mexico. The proper Court there decreed probate of a Spanish translation and not of the original :—

Held, that the grant in this country must be made upon the production of an English translation of the Spanish copy, and not of a certified copy of the original.

On the 9th of October, 1875, John Richard Rule, domiciled at Panchuca, in Mexico, executed a will according to the law of Mexico, and appointed John Potts and Thomas Horncastle executors. The will was written in English. He died at Panchuca on the 28th of April, 1876, and on the 24th of May following the will was formally opened before the civil judge, and after a Spanish translation of it had been made it was deposited in the archives of the Mexican Court. On the 29th of May the judge decreed that the Spanish translation duly verified be notified to the executors for their acceptance and oath, and sent to England as notice to the legatees. This decree was registered in Mexico on the 3rd of June following.

Mr. Horncastle executed a delegation of his office upon Mr. Potts, who died on the 27th of November following, and on the 16th of February, 1877, Mr. E. A. Gibson was appointed by the judge in Mexico executor for and on behalf of the heirs.

Upon Mr. Gibson applying for letters of administration (with the will annexed), limited to the property in this country, the registrars refused to make the grant until a copy of the original will was obtained from Mexico.

Searle, moved for grant of letters of administration (with will annexed) upon production of a translation into English of the Spanish translation of the original will. The Court acted upon the Spanish translation, and not upon the original will: *In the Goods of Deshais* (1); *In the Goods of Clarke.* (2)

(1) 4 Sw. & Tr. 13, 15; S. C. 34 L. J. (P. M. & A.) 58.
(2) 36 L. J. (P. M. & A.) 72.

1878

IN THE GOODS OF RULE.

THE PRESIDENT. The certified translation of the original will is the proper document upon which I must act. The courts of this country give credit to a foreign tribunal for having duly investigated the facts upon which it proceeded, and in this case I find that the foreign Court has recognised the existence of a will in a particular form as contained in a Spanish or alleged Spanish translation of the original will. That, therefore, is the only document on which I can proceed, and upon that document being translated into English I shall act upon it. I grant administration, with the will so translated annexed.

Solicitors for all parties: *Boltons, Robins, & Busk.*

IN THE GOODS OF WILLIAM BRIDGER.

March 12.

Will of Married Woman—Executrix—Chain of Representation.

The administrator (with will annexed) of the estate of a married woman does not as such represent an estate of which she was executrix.

E. C. S., surviving executrix of W. B., made, while covert, a will, and appointed J. S. her executor. J. S. was also solely entitled to all the estate of E. C. S., of which E. C. S. had no disposing power:—

Held, that J. S., as administrator (with will) of E. C. S., did not represent W. B. Grant of letters of administration (with will) de bonis non of W. B. given to R. F., a residuary legatee under that will.

WILLIAM BRIDGER, late of Bishopsgate Street Within, in the City of London, died on the 28th of May, 1864, having made his will, dated the 14th of April, 1862, and thereof (amongst others) appointed his wife, Ellen Charlotte Bridger, executrix, and named Rosa Feast a residuary legatee. Ellen Charlotte Bridger survived her co-executors, and intermarried with John Stanley. During her second marriage she, by virtue of the powers vested in her by her marriage settlement with Stanley and of all other powers her enabling, made her will, and thereof appointed John Stanley sole executor, and devised and bequeathed to him all estates vested in her as trustee or mortgagee. He was also the sole person entitled to her personal estate, over which she had no disposing power. She died on the 12th of June, 1876, and on the

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IN THE GOODS OF BRIDGER.

11th of July following letters of administration in the form referred to in the judgment, with her will annexed, were granted to John Stanley.

Part of the estate of William Bridger remained unadministered.

Jan. 29, 1878. *Searle*, moved for a grant of administration (with will) de bonis non of the personal estate and effects of William Bridger to Rosa Feast, one of the residuary legatees named in the will.

Cur. adv. vult.

March 12, 1878. THE PRESIDENT. William Bridger died in May, 1864, having made his will, of which he appointed his wife (with others) executrix. She proved this will, and survived the other executors.

She afterwards married John Stanley, and during coverture with him made a will under certain powers vested in her, and appointed her husband, John Stanley, sole executor, who was the sole person entitled to the personal estate over which she had no disposing power. She died on the 11th of July, 1876, and thereupon letters of administration, with her will annexed, were granted to John Stanley.

Administration to the unadministered estate of Bridger is now asked by Rosa Feast, daughter of Bridger, and one of the residuary legatees under his will.

The question is, whether this is necessary or can be granted, having regard to the fact that administration of the effects of Ellen Charlotte Stanley, formerly Bridger, with her will annexed, has been granted to John Stanley.

The question appears to me to be one of construction. What is the meaning of the language of the grant which has been made? The grant recites that Ellen Charlotte Stanley having during her coverture with John Stanley, by certain powers and authorities given to and vested in her by an indenture of the 28th of March, 1866, and all other powers and authorities her enabling, made and executed her last will and testament bearing date the 12th of April, 1875, and thereof appointed her husband, John Stanley, sole executor, and that the said John Stanley, as the lawful husband of the said deceased, was the sole person entitled to her

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personal estate over which she had no disposing power, and concerning which she had died intestate, and proceeds as follows:— "And be it also known that at the date hereunder written letters of administration, with the will (a copy whereof is hereunto annexed) of the personal estate of the said deceased, were granted to the said John Stanley."

This language appears to me to apply only to the personal estate which belonged to the deceased in her own right, and not to personal estate which was vested in her as executrix. The appropriate language to carry the estate of an executrix will be found in the form of probate of a married woman's will, including an executorship belonging to her, which recites that "administration of all such personal estate as she by virtue of the aforesaid indenture had a right to appoint or dispose of, and has in and by her said will appointed or disposed of accordingly; and also so far as concerns all such personal estate and effects as vested in her, the said deceased, as sole executrix of the will of the said E. B., but no further or otherwise, was granted by the Court to the said C. D."

In the absence of language to this effect, the administrator of the estate of a married woman deceased, with the will annexed, takes only as an administrator of an executrix, that is, he has no privity or relation with the original testator, and in no way represents him. This appears to me to be the true view of the case upon principle, and is not inconsistent with the authorities.

In *In the Goods of Martin* (1) A. died leaving a will, by which he appointed his wife sole executrix. She proved the will, and afterwards married B., and during her coverture made a will in execution of a power, and appointed B. her sole executor. Thus far the facts are precisely the same as in the present case. Upon the death of B.'s wife, he took out limited probate of her will, and also administration of the rest of her effects. It was held that he was entitled as representing the whole of his wife's personal estate to administration of the unadministered effects of A. This decision proceeds on the assumption that neither the limited probate of the wife's will, nor the administration of the rest of her estate, carried with it the administration of the unadministered effects of

(1) 3 Sw. & T. 1; S. C. 32 L. J. (P. M. & A.) 5.

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the first testator, and that therefore a fresh grant was necessary as to them, of which the Court considered the husband was the proper grantee.

It appears to me that in the present case the administration granted to J. Stanley, with the will of his wife annexed, did not carry with it more than the limited probate and the cœterorum grant did in the case cited, and that therefore a further grant is required as to the unadministered effects of Bridger. To whom that grant is to be made is not in question here, as, if a grant is necessary, J. Stanley consents to it being made to the present applicant, the residuary legatee.

In the Goods of John Hughes (1) Sir Cresswell Cresswell held that the will of a married woman made under a power, and appointing executors, did not continue the chain of representation from a former will, of which the married woman was executrix. In the case of *In the Goods of Richards* (2) Lord Penzance followed the decision in *In the Goods of Martin* (3), and by implication held that the chain of representation was not continued by the will of a married woman appointing an executrix to whom administration of the rest of her effects was also given, and administration of the unadministered effects of the original testator was accordingly granted.

I, therefore, hold that the chain of representation is broken in the present case, and that administration of the unadministered effects of Bridger, deceased, must be granted to the present applicant, as residuary legatee.

Solicitors for all parties: *Gush & Phillips.*

(1) 4 Sw. & Tr. 209; S. C. 29 L. J. (P. M. & A.) 165.
(2) Law Rep. 1 P. & D. 156.
(3) 3 Sw. & Tr. 1; S. C. 32 L. J. (P. M. & A.) 5.

IN THE GOODS OF ISAAC DIXON.

1878
April 16.

Will—Construction—Legal Heirs—Residuary Legatees.

I. D., by his will, gave all his property to A. H. for life, and then "the whole" . . . . to his "legal heirs and theirs for ever":—

The Court *held*, that both his realty and personalty were given to his co-heiresses, and therefore made the grant to M. T., one of the co-heiresses, as one of the residuary legatees.

Isaac Dixon, late of Cockermouth, in the county of Cumberland, grocer, made his will, bearing date the 5th of September, 1868, and thereby gave the whole of the income of his estate and effects to his aunt, Ann Hill, for life, with the following further devise and bequest:—"The whole after her decease, after funeral expenses, medical attendances, and trustees' necessary expenses, and reasonable remuneration goes to my legal heirs, and theirs for ever."

He died on the 15th of January, 1870, and his property at his death consisted of a freehold house and personalty under the value of 600*l*.

Administration with the will annexed had been granted to Ann Hill, who died in May, 1876. On the 20th of March, 1877, application was made for a grant of administration de bonis non with will annexed to Martha Todhunter as one of the residuary legatees referred to in the will. The Court directed notice to be given to the next of kin, which having been done,

March 12, 1878. *Bayford*, renewed the application. Miss Todhunter, as one of the co-heiresses of the testator, is, under the words "legal heirs," entitled to the grant as one of the residuary legatees: *De Beauvoir* v. *De Beauvoir* (1); Jarman on Wills, vol. ii. p. 73, 3rd ed.

Dr. Tristram, for the next of kin. There is nothing in the will to shew that the testator knew that he was disposing of real estate. The gift, therefore, is either void for uncertainty, or "heirs" should be construed as next of kin: *Thomason* v. *Moses* (2);

(1) 3 H. L. C. 524. (2) 5 Beav. 77.

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Williams on Executors, 6th ed. p. 1032; *In re Philps' Will* (1); *In re Steeven's Trusts.* (2)

Cur. adv. vult.

April 16, 1878. THE PRESIDENT:—In this case the deceased, Isaac Dixon, died on the 15th of January, 1870, possessed of real and personal estate. By his will, dated the 5th of September, 1868, he appointed certain persons trustees and managers on behalf of his aunt, Ann Hill. The will proceeds:—"I hereby give and bequeath to the said Ann Hill the whole of my income, that is or can be derived from my estate and effects, for her maintenance and support, and the use of what household furniture might be necessary for her comfort after my decease, as long as she lives; the stock-in-trade and remaining portion of the furniture to be sold, and the money derived therefrom, with all other moneys recoverable belonging to the estate, to be placed by the above trustees to the best advantage and security of their ability and belief, the whole after her decease, after funeral expenses, medical attendances, and trustees' necessary expenses and reasonable remuneration, goes to my legal heirs and theirs for ever."

The question is, whether, on the true construction of the words "my legal heirs and theirs for ever," the co-heiress took as residuary legatee of the personalty as well as realty and would, therefore, be entitled in that character to a grant of administration with the will annexed?

This being a mixed fund there is no doubt that the heir of the testator would take the realty. The question then arises whether there is anything to shew that the testator intended by the same words to designate different persons to take the realty and the personalty. In some circumstances the word "heirs" may undoubtedly be considered in a wider sense than that technically given to it by the English law, and may mean those entitled to take either by inheritance or succession, but it is a fixed principle of construction, applicable to all instruments, that the person whose words are to be interpreted must be presumed to have used them in their true legal signification, unless the contrary appears from the context taken in connection with the facts to which the

(1) Law Rep. 7 Eq. 151. (2) Law Rep. 15 Eq. 110.

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IN THE GOODS OF DIXON.

document relates. I have looked in vain for anything in this will to shew that the testator meant by the words "legal heirs and theirs for ever" other persons than those properly fulfilling the description of heirs. That the testator was an illiterate person, probably ignorant of the true meaning of legal phraseology, might assist the Court if it had to choose between conflicting presumptions, but there is here nothing to shew that the testator had in his mind an intention that his property, which he deals with as one entire fund, should be distributed in different directions. The case appears to me to be directly within the authority of *De Beauvoir* v. *De Beauvoir* (1), the effect of which is clearly stated in the following passage of the judgment of Lord St. Leonards (then Lord Chancellor), at p. 557: "As far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform—to give to the words the sense which the testator has himself impressed upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as persona designata. It is impossible to lay down any other rule of construction." In the present case the testator died leaving co-heiresses. This, however, makes no difference in the construction to be put on the will. *De Beauvoir* v. *De Beauvoir* (1) is an authority that the use of the word "heirs" in the plural will not by itself affect the presumption that the testator intended to designate his proper legal heir, and the case of *Mounsey* v. *Blamire* (2) shews that co-heiresses take as legatees under a bequest to "my heir," if there be no context to explain it otherwise.

I therefore grant administration, with the will annexed, to the applicant, as one of the residuary legatees of the testator; the costs of both parties to be paid out of the estate.

Solicitors for heir-at-law: *Bell, Brodrich, & Gray.*
Solicitors for next of kin: *Speechley & Co.*

(1) 3 H. L. C. 524. (2) 4 Russ. Ch. Cas. 384.

1878
May 4.

SMITH AND KIRK *v.* HOPKINSON.

Costs—Payment out of real Estate.

The testatrix by her will directed that her testamentary expenses be paid out of her real and personal estate. The personal estate being insufficient, the Court ordered payment of the costs of suit out of the real estate upon conditions assented to by all parties.

MARY MARIA NIGHTINGALE, late of Wheatcroft, in the parish of Crich, in the county of Derby, spinster, made a will dated the 26th of February, 1875, whereby she devised to the defendant and his children two small farms subject to the payment of certain annuities, and bequeathed the residue of her personal estate after certain specific legacies amongst the plaintiffs and others. By a will dated the 6th of January, 1877, she revoked the gift of part of one of the farms, which she devised instead to the plaintiff Smith and his wife, and she appointed both plaintiffs executors, and directed amongst other things that her "just debts, funeral, and testamentary expenses be paid and discharged out of her real and personal estate." The instructions for the latter will were given by the testatrix to the plaintiff Smith, and the will was prepared by his direction, and at the wish of the testatrix kept secret from the defendant. She died on the 22nd of March, 1877, and probate of the latter will was opposed by the defendant on the ground that it was not duly executed, and by reason of incapacity and undue influence. The issues were tried before the President by a special jury, when a verdict was found for the plaintiffs, and the Court pronounced for the will.

Mellor, Q.C. (*Bayford,* with him), for the defendant, asked that his costs might be allowed out of the real estate, the personal estate being insufficient.

Inderwick, Q.C. (*Powles,* with him), for the plaintiffs, offered no opposition, provided that the costs be paid rateably upon the hares of each devisee.

THE PRESIDENT. The circumstances of the case would justify

an order for payment out of the personal estate, and, as the parties consent, I order payment rateably out of the real estate. 1878

SMITH v. HOPKINSON.

Solicitors for plaintiffs: *Johnson & Weatherall, for G. Cursham, Ripley.*

Solicitor for defendant: *E. Warriner, for W. B. Hextall, Derby.*

IN THE GOODS OF WILLIAM BELL.

July 7.

Executor according to Tenor.

A testator gave to W. F. B. and H. H. W. all his real and personal estate to apply the same, "after payment of debts," to the payment of legacies.

The Court granted probate to W. F. B. and H. H. W. as executors according to the tenor.

THIS was an application for grant of probate to executors according to the tenor.

William Bell, late of Yatton Lodge, Rudgwick, in the county of Sussex, Esq., deceased, died, having made his will bearing date the 16th of November, 1877.

By the will the testator gave "all my real and personal estate . . . (except what I otherwise bequeath and devise by this my will) unto William Fry Buchanan . . . and the Rev. Henry Hoyle Winwood, upon trust to pay and apply the rents, interest, and annual produce thereof to the following purposes." Then followed a series of bequests in paragraphs, numbered 1, 2, 3, &c. Paragraph 5 contained a gift of residue "after payment of my lawful debts and liabilities;" and paragraph 6 also contained a similar devise and bequest "after payment of my lawful debts and liabilities."

Searle, moved the Court to grant probate of the will to Mr. W. F. Buchanan and the Rev. H. H. Winwood, as executors according to the tenor. Their duties are to pay the debts and legacies, and to hand the residue to the residuary legatee: *Pickering* v. *Towers* (1); *In the Goods of Fry* (2); *In the Goods of Adamson.* (3)

THE PRESIDENT. I think that by the true construction of the

(1) 2 Lee, 401. (2) 1 Hagg. 80.
(3) Law Rep. 3 P. & D. 253.

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IN THE GOODS OF BELL.

will these gentlemen are appointed to collect the assets and pay the debts and legacies, and that therefore probate should be granted to them as executors according to the tenor.

Solicitors: *Bowker, Peake, Bird, & Collins.*

1879

Feb. 18.

IN THE GOODS OF JOHN SEE.

Administration—Executor not competent—20 & 21 *Vict. c.* 77, *s.* 73.

The sole executrix and universal legatee, having died in the testator's lifetime, and the next of kin being abroad, the Court granted letters of administration with the will annexed, to the guardian of persons entitled in distribution.

JOHN SEE, late of No. 4, Princess Street, in the parish of Marylebone, bricklayer, deceased, died on the 28th of November, 1878, having made his will bearing date the 8th of December, 1877, and thereof appointed his wife sole executrix and universal legatee. She died in his lifetime.

The testator had two children, one of whom, viz. Ann Elizabeth See, also died in his lifetime, leaving three children minors. The testator's other child, John Allanby See, was in America and could not be found. The testator's property consisted of (amongst other things), a leasehold house, and an immediate representative was necessary to receive the rent and pay the ground rent.

Searle, moved the Court for a grant of letters of administration with the will annexed, to George Thurston See, as guardian of the children of Ann Elizabeth See. The case is within the provisions of the 73rd section of 20 & 21 Vict. c. 77. There is no executor competent to take probate. *In the Goods of Sawtell* (1), *In the Goods of Pine.* (2)

THE PRESIDENT. I think the guardian is entitled to the grant under the 73rd section.

Motion granted.

Solicitors: *Smith, Fawdon, & Low.*

(1) 2 Sw. & Tr. 448. (2) Law Rep. 1. P. & D. 388.

D'ALTON *v.* D'ALTON. 1878

May 8.

Children—Custody—The Mother a Roman Catholic and the Father a Protestant.

Although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father, and different from that in which they have been educated during the cohabitation of their parents.

A husband and wife having been Roman Catholics, the husband afterwards became Protestant, and placed the children at a Protestant school. The wife filed a petition for judicial separation, but withdrew it and returned to live with her husband on his promise that the children should be educated as Roman Catholics. He broke the promise, and she subsequently filed another petition and obtained a judicial separation.

Upon an application by the wife for custody of the children that they might be educated as Roman Catholics, the Court rejected the application, and gave the custody to a third person, with full access by both parents.

THE petitioner and respondent were married in November, 1867, and there were issue of the marriage two boys who, at the time of this application, were respectively nine and seven years of age. At the time of the marriage both husband and wife were members of the Roman Catholic Church, but the husband afterwards became a Protestant, and in 1875 placed the children at a Protestant school kept by Miss Ballard, where they had ever since remained. Subsequently in May, 1875, the wife filed a petition for judicial separation, but withdrew it a month afterwards and returned to live with her husband, upon his promise to allow the children to be educated as Roman Catholics. This promise was not kept, and upon the husband being again guilty of misconduct the wife filed another petition, and obtained a decree of judicial separation by reason of her husband's cruelty and adultery.

She then made an application for the custody of the children of the marriage.

Cur. adv. vult.

Jan. 21, 1878. THE PRESIDENT. This case has given me very great anxiety, and it is with much hesitation that I have arrived at the conclusion which I am about to state. In the unfortunate circumstances which have arisen between the parties to this suit, the sole difference between the parents with regard to the children

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being now apparently the question of religion, I have to consider what is most for the benefit of their offspring, whose interests are of paramount importance upon this application.

If these parents had been of the same religion I should have given the custody of one, and possibly of both, of the children, at any rate for the present, to the mother, upon the principle that she ought not, by reason of the wrongful act of the father, to be deprived of the comfort and society of them. But as she avows that her main object is to bring them up as Roman Catholics, I have to consider, first of all, whether she has any right to insist upon this? and, secondly, whether it is for the interests of the children that she should so bring them up?

With regard to the rights of the petitioner, the principle which guides the Court is, that the innocent party shall suffer as little as possible from the dissolution of the marriage, and be preserved, as far as the Court can do so, in the same position in which she was while the marriage continued—first, by giving her a sufficient pecuniary allowance for her support; and, secondly, by providing that she should not be deprived of the society of her children unnecessarily. As it has been put by one of my predecessors, "the wife ought not to be obliged to buy the relief to which she is entitled, owing to her husband's misconduct, at the price of being deprived of the society of her children." But it is to be remembered that if the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children. Does then the fact that a judicial separation has been granted to her confer upon her a new right in this respect? and does not the answer to that question afford the foundation for the judgment which I ought to pronounce?

It has been very naturally argued that weight ought to be given to the husband's written promise as to the religious education of the children, but in considering its legal effect I feel I must not give way to the strong feeling of sympathy which that document naturally creates in my mind, as the husband, whatever promise he may make to the wife upon the subject, is always, in

point of law, entitled to retract it. A much more favourable impression would undoubtedly have been left upon my mind with regard to Mr. D'Alton if he had simply avowed that he had altered his mind, and now retracted his promise; and if that promise had only recently been given and immediately retracted, it might have had the effect of leading me to think that this zeal of his with regard to his children's religious education was only affected for the purpose of annoying his wife. But I am bound to say that when I look at the dates I do not think I can fairly act upon that assumption. The promise was made in 1875, and assuming it was sincerely given, Mr. D'Alton may have been willing to make even so considerable a sacrifice as that of the question of the children's religious education, for the purpose of bringing about a reconciliation with his wife, and I can easily imagine that as time passed on his feeling might have altered, and that, notwithstanding the promise, he might afterwards insist on their being brought up as Protestants.

It appears then that at some time or other, he says the day after the promise (I hope for his sake it was not exactly so) but at some time afterwards, and long before the cohabitation ceased, he had given directions that the children should no longer be brought up as Roman Catholics, and that therefore while he possessed the full right to exercise his paternal authority, he caused the children to be brought up as Protestants. As this state of things was brought about by the husband while he had the right to exercise his privileges as a father, and continued so long before the institution of this suit, I cannot say that it is in the interest of the children that they should now have their course of education interrupted, and be sent to an establishment where they may be brought up in the Roman Catholic religion. That they were born and baptized in that faith must not weigh with me when I regard their tender age at the time when the change was made, as they were not of an age when it is possible to conceive that the doctrines of the Roman Catholic Church had become so implanted in their minds that it would do them permanent injury to be educated in the faith of the Protestant Church, to which they have now been accustomed for more than two years.

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I have, therefore, come to the conclusion that I am not entitled to give these children to the mother for the avowed purpose of having their course of religious instruction changed by their being brought up in the Roman Catholic religion, and, that I must refuse to give her the custody of them. On the other hand acting, as I have said, upon the principle that she is to be injured as little as possible in her maternal rights, I should allow as large an intercourse with her children as the circumstances admit; nor do I intend to give the husband the custody in the ordinary sense of the word, which would enable him to do what he pleased, under any circumstances, without reference to the wife. She must have access to them at all convenient times, but not exceeding that which is customary, at the school where they are placed. The children are boarders at a school against which the mother has no complaint to make, except that they are there brought up as Protestants. I see no reason therefore to remove them, and I commit the custody to Miss Ballard for the present until further order, with liberty to the father and mother to have access to them from time to time. I need not specify the times the father is to have access, as if there is any difficulty it can be arranged at the registry.

It is desirable in the interest of these children that they should not be troubled with their parents' dissensions, nor be made the depository of their parents' grievances, the one against the other; and if either parent should make use of the access to influence the children against the other parent I should interfere to deprive the disobedient party of all right of access.

The result is that I order the children to be restored to the custody of Miss Ballard, with access on the part of both parents in the manner I have specified.

Order accordingly.

From this order the petitioner appealed, and the appeal was argued before the full court. (1)

May 8. The petitioner appeared in person.

(1) The President, Sir R. J. Phillimore, and Mr. Justice Lopes.

McCall, for the respondent, referred to *Symington* v. *Symington* (1) and in *Re Meades*. (2)

SIR R. J. PHILLIMORE. This is an appeal from the judgment of the Judge Ordinary, with respect to the custody and education of two boys, the children of the parties. The wife has obtained a judicial separation from the husband on the ground of his adultery and cruelty, and so far as sympathy is concerned in the matter it is impossible not to feel it for the petitioner who has addressed the Court to-day. The decision of the Judge Ordinary was that the two boys, one of the age of nine and the other of the age of seven years, shall be placed in a school belonging to the Church of England and there educated, access being given to both parents on proper conditions. The wife made an application to the Judge Ordinary which she has renewed to day, to the effect that she should have the sole custody of the children, on the ground that the father was originally a Roman Catholic, and that the children have been brought up in the Roman Catholic faith, and that the statement of the husband, now that he has become a member of the Church of England, is insincere on his part, and made for the purpose of depriving her of the custody of her children.

In all these painful cases it appears to me that the first duty of the Court is to consider what is for the benefit of the children. That should be the paramount consideration with the Court, and I am of opinion that the Judge Ordinary was correct in the judgment which he formed, both with regard to the facts of the case and the law applicable to it. He held that it was for the interest of these children, looking at all the facts, that they should be educated as to a great degree they have been for several years in the place where the father had placed them, and that the course of their education there ought not to be interrupted or disturbed. There was no evidence of the alleged insincerity of the father with respect to his religious belief. The custody of the children is not absolutely given to him; it is vested in the schoolmistress. Both parents have all reasonable opportunity given to them of access to their children, and the decision of the Judge Ordinary that the boys should be brought up in the religion which their

(1) Law Rep. 2 H. L., Sc. 415. (2) 5 Ir. Rep. Eq. 98.

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father professes and has professed for some time, was a proper decision.

My opinion therefore is that the order should be undisturbed, and should be affirmed by us.

LOPES, J. It is for the interest of the children in this very painful case that the decision of the Judge Ordinary should not be disturbed.

It cannot be doubted that the exact object which the petitioner has in view in obtaining the custody of the children is to bring them up as Roman Catholics. It is urged that the respondent has adopted the Protestant faith for the purpose of annoying the petitioner, and not upon conviction. I cannot see that the evidence supports that contention, and I unhesitatingly say that I think the Court, in the particular and painful circumstances of the case, has adopted a wise course. It has given the custody of the children neither to the father nor to the mother, but to Miss Ballard, the schoolmistress, and they are to be educated in the way they have according to the evidence been educated for some years past, and in the faith professed by the father, with, it is observed, the fullest access by the mother. The children are also to spend their holidays with both parents. I think the order should not be disturbed.

THE PRESIDENT. I have nothing to add.

Judgment affirmed, and appeal dismissed.

The Petitioner in Person.

Solicitor for respondent: *M. S. A. D'Alton.*

[IN THE ARCHES COURT OF CANTERBURY.]

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Nov. 28.

[APPEAL FROM THE CONSISTORY COURT OF ROCHESTER.]

BRADFORD *v.* FRY; BULLARD AND NASH INTERVENING.

Faculty—Parties—Confirmatory Faculty—Chancel-Screen—Steps to Communion Table—Inhibition—Appeal.

5 PD 69

One of the churchwardens of a parish church applied to the ordinary for a faculty authorizing him to remove certain things alleged to have been introduced into the church without the sanction of a faculty. An appearance in the suit was entered on behalf of the vicar of the parish, the remaining churchwarden, and other opponents, who proved that the things in respect of which the faculty was prayed had been in the church for periods varying from two to nine years respectively, but made no application for a confirmatory faculty. The ordinary decided that it was competent for the promovent to promote the suit in opposition to his co-churchwarden, and ordered a faculty to issue as prayed, on the ground that the things had been placed in the church without the authority of a faculty.

Amongst the things for the removal of which a faculty was ordered to issue were the following:—1. A chancel-screen with gates, the screen made of oak, about thirteen feet in height, with close panels up to the height of 2 ft. 6 in. from the ground, and open tracery above, and surmounted with a cross over the centre opening. 2. Three additional steps, on which the communion table was raised above the floor of the chancel. 3. A wooden screen separating the south transept from the rest of the church. Against the decree of the ordinary, so far as it authorized the removal of the things last above-mentioned, one of the opponents appealed to this Court, and by leave of this Court and consent of all parties, two of the parishioners who had not appeared in the Court below were allowed to intervene in the appeal, and prayed that a confirmatory faculty authorizing the retention of the things forming the subject-matter of the appeal might issue.

The Court directed that a confirmatory faculty should issue to the interveners authorizing the retention in the church of the chancel-screen, without the gates and with the panels in decent form, but in all other material respects confirmed the decree of the ordinary.

THE proceedings in this case commenced by a petition to the Bishop of Rochester, under the hand of Thomas Henry Fry, one of the then churchwardens of the new parish of St. James, Hatcham, in the diocese of Rochester. The petition alleged, inter alia, substantially as follows:—

1. There is now standing in the new church of St. James, Hatcham, in a recess on the north side thereof, a structure of wood known as a confessional box, which was until lately used for the purpose of hearing confessions.

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2. There is affixed to the south wall of the said church a tablet of wood with folding doors, on which there was originally the following inscription: "Saint James' Hatcham Ward of Confraternity of the Blessed Sacrament," and then followed inscribed thereon the names of the members of the said ward, commencing with "Arthur Tooth, warden;" the said inscription and names on the said tablet are now entirely obliterated with black paint.

3. There are in the said church certain music stands fixed to the floor which has been placed over a portion of the vestry, and which music stands have on certain occasions been used by a brass band which was introduced into the said church to assist the choir on such occasions.

4. There is in the said church a wooden structure with folding doors, known as a triptych, affixed to the wall over the communion table at the east end of the said church; the said wooden structure extends upwards across the east window, and consequently deprives the chancel of sufficient light.

5. There is in the said church a screen with gates separating the nave from the chancel; the said screen is chiefly made of wood, and is of heavy workmanship, and consequently greatly interferes with the transit of sound from the chancel to the body of the church; the lower panels of the screen were formerly filled with paintings, which have been entirely obliterated.

6. The communion table in the said church is raised to a great height above the floor of the chancel by the substitution of three upper or additional steps, there being in all five steps between the floor of the chancel and the communion table, and three steps between the nave of the church and the chancel.

7. There is in the said church a screen of wood separating what is called the "lady chapel" from the rest of the church; the said screen is of heavy workmanship, and interferes with the hearing and seeing of the people who may be in the said chapel during divine service.

8. There is in the said church a wooden beam extending across the nave at a distance of about twelve feet from the ground; the said beam is placed there only for the purpose of supporting a metal crucifix, which was until lately placed thereon, but has been removed, and was not in any way part of the structure of the church, and consequently the removal of it would not in any way affect the stability of the fabric or roof.

9. All the before-mentioned articles and things have been placed in the said church since the consecration thereof, and without any faculty for the same.

10. Some of the said articles and things are, in the opinion of the petitioner, illegal, and all the said articles and things are objectionable, and are illegally kept in the said church, and the petitioner is desirous that the same should be removed.

The 11th paragraph of the petition prayed that a faculty might issue to the petitioner authorizing him to remove all the above-mentioned articles.

The petition then continued in the 12th and 13th paragraphs thereof in substance as follows:—

12. The stone or slate tables of commandments, which were originally placed on either side of the communion table at the east end of the church, have lately

been discovered in a vault under the said church, and the said petitioner is desirous that the same should be replaced as they originally stood at the east end of the said church.

13. The said petitioner is of opinion that it is desirable to set up the said screen mentioned in paragraph 7 of the petition, or a portion thereof, around the north door of the said church.

The petition concluded by praying that the faculty to be granted to the promovent might also authorize him to replace the tables of commandments at the east end of the said church, and to set up the said screen around the north door of the said church.

On the 6th of September, 1877, a citation or decree with intimation reciting the above-mentioned petition, and calling upon the parishioners and inhabitants of the new parish of St. James, Hatcham, and all others having interest, to appear and shew cause why a faculty should not be granted according to the prayer of such petition, issued out of the registry of the consistory court of Rochester. After due service of the citation an appearance was given on behalf of D. P. Waters, J. Plimpton, J. Bradford, J. Thompson, R. A. Webb, and the Rev. Arthur Tooth, against the grant of the faculty as prayed, and their solicitors on or about the 23rd of October, 1877, brought in an act on petition, which so far as material alleged in substance as follows:—

1. All the opponents are parishioners and inhabitants of the said parish of St. James, Hatcham. The opponent R. A. Webb, is also one of the churchwardens of the said parish, and the opponent Arthur Tooth is the incumbent of the said parish.

2. The promovent in this cause is, and sues as one of the churchwardens of the said parish.

3. The opponents submit to the Court that it is not competent to the said Thomas Henry Fry to sue or to promote this cause as such churchwarden alone, without joining, and in fact against, the other churchwarden of the parish.

4. The several alterations proposed and recited in the citation, are repugnant to the feelings and wishes of the majority of the parishioners of the said parish, and especially to the majority of such of them as are communicants, or are in the habit of attending, and forming part of the congregation of, the church of the said parish.

5. The opponents submit that the said articles and things were for the most part presented and given to the said church and the said Rev. A. Tooth, the incumbent of the said parish, by such parishioners as aforesaid, and that the same ought not to be removed without the consent of such donors.

6. The opponents submit that none of the articles and things proposed to be removed are illegal or objectionable.

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7. The said articles and things have been in the said church for a long time; . . . their removal after so long a lapse of time would inflict injury upon the feelings of the majority of such of the parishioners as are in the habit of attending and forming part of the congregation.

8. The crucifix referred to in paragraph 8 of the citation (1) was unlawfully removed by the said T. H. Fry, and ought to be restored by him, and the object of his petition, so far as regards the articles and things specified and referred to in the said 8th paragraph, is to procure protection for himself against the consequences of his unlawful acts and omissions.

9. The opponents deny that the said triptych obstructs the light to the chancel, and that either of the screens interfere with the transit of sound or with the hearing and seeing of any of the people, and say that the steps round the holy table are not in any way of inconvenient shape or dimensions.

The prayer of the act on petition was in terms as follows:

Wherefore the said solicitors for the opponents pray the right worshipful the judge to refuse to decree a licence or faculty for the purposes aforesaid; to condemn the said T. H. Fry in the costs of this cause, and to decree or order him to make good the injuries suffered by the articles and things specified in paragraphs 2 and 5 of the citation (1), and to restore the crucifix referred to in paragraph 8 thereof, and otherwise, that right and justice may be done and administered to his said parties in the premises.

The answer to the act on petition denied the allegations in the fourth and ninth paragraphs of the act on petition, and alleged that Mr. Fry was competent to be the promovent in the cause; that the consent of the donors was not necessary to be obtained for the alterations prayed for by the promovent; that the articles or things referred to in the seventh paragraph of the act on petition were illegal and all of them objectionable, and articles for the introduction of which into the church a faculty would not have been granted, and continued in the 6th and 7th paragraphs as follows:—

6. In reply to the 7th paragraph of the said act, and with regard to the wooden beam with the crucifix thereon, to which the said paragraph of the said act, inter alia, refers, the proctor for the promovent says that proceedings were taken against the said Rev. A. Tooth, under the Public Worship Regulation Act, 1874, on account of many violations of the laws ecclesiastical (2) and by a monition under the said Act served on the said Rev. A. Tooth on the 29th of July, 1876, the said Rev. A. Tooth was amongst many other things monished for having in or about the month of August 1872, without lawful authority, and unlawfully introduced

(1) The paragraphs of the citation were numbered to correspond with the paragraphs of the petition.

(2) See *Hudson* v. *Tooth*, 2 P. D. 125.

into the said church and retained there at the time of the said monition a large crucifix several feet high over the nave near the pulpit, and that the said crucifix (which was removed after the serving of such monition as aforesaid), is the crucifix referred to in the said 7th paragraph, and that the said beam was erected and used solely for the purpose of supporting the said crucifix and is now useless and objectionable. The proctors for the promovent say further, and with regard to the screen, separating the lady chapel from the church, that in the year 1871, the said Rev. A. Tooth without lawful authority, and unlawfully introduced into the said lady chapel and retained there till the date of the said monition a second or additional communion table, and the said Rev. A. Tooth was by the said monition monished for having so introduced and retained the same, and the same was, subsequently to the service of the said monition as aforesaid, removed.

7. The proctor for the promovent further in reply to the 8th paragraph of the said act, and in reference to the removal of the crucifix therein-mentioned, repeats so much of the 6th paragraph above as relates to the said crucifix, and says that the same was properly removed, as being illegal, and in consequence of the said monition.

Further pleadings were subsequently entered into; the solicitors for the opponents bringing in on or about the 20th of November, 1877, a rejoinder, wherein they pleaded that the 6th paragraph of the answer was bad in law, and, inter alia, alleged that before the 20th of November, 1877, the articles mentioned in the 1st, 2nd, and 4th paragraphs of the citation, and the cross on the screen mentioned in the 5th paragraph thereof, had been removed from the places they had occupied at the date of the citation, by the neglect or carelessness of the promovent in his office of churchwarden, and that he ought to be ordered to restore the same. The proctors for the promovent, in a reply to the rejoinder, admitted the removal of the articles there referred to, but alleged that such removal had not been occasioned by the neglect or carelessness of the promovent in his office of churchwarden, and had taken place without his knowledge.

On the 2nd of February, 1878, the cause came on for hearing on affidavits before the chancellor of the diocese of Rochester. (1)

The affidavits used on behalf of the promovent verified the allegations of facts in the petition, and moreover alleged that the promovent was a parishioner and ratepayer of St. James', Hatcham, that the articles objected to had been in the church for specified periods varying from two to nine years, and that the chancel-screen

(1) The court was held in the vestry of the parish church of St. Alphege, Greenwich.

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was about thirteen feet in height. A report, made by the architect who had been employed about the design and erection in the church of St. James, Hatcham, of the chancel-screen, the side chapel-screen, and the steps to the communion table, and annexed to an affidavit in which such architect deposed to the truth of the statements in such report was brought in on behalf of the opponents. The material portions of such report were substantially as follows:—

The chancel-screen: This screen, composed of oak with panels 2 ft. 6 in. high, and open tracery above, and surmounted by a plain cross, is placed in the ordinary position at the chancel arch, and is a very usual feature in churches of this date of architecture. The panels at the base, which contained at one time a series of paintings, are kept below the level of the backs of the choir seats, and the open portions above are no obstruction to the sight or sound from the chancel, there being, up to a height of eight feet from the nave floor, but four small upright posts carrying the open tracery. The central opening is five feet wide, and the four side openings nearly three feet wide. The screen marks the architectural division between the chancel and the nave. This work was executed in the year 1869.

The side screen: This is a low screen 8 ft. 6 in. high of oak. There are closed panels up to the height of the seat backs, and above that height there is open work with two open doorways in its length, causing no obstruction to sight or sound. This work was erected in the year 1870.

The steps to the holy table: These were placed in their present position in the beginning of the year 1875, when the whole of the chancel pavement was relaid; the former pavement being in a bad condition, and being originally laid with tiles of a very inferior make. The result of this alteration was that the holy table was raised five inches only above the height it previously stood, only one step being added, and it would both artistically and architecturally (having regard to the general character of the church), be a great disfigurement to interfere with the present arrangement. The chancel at the east end is raised 3 ft. 4 in. above the level of the nave, and this is a usual height in churches, and is one most generally adopted in church building. The holy table does not stand at any unusual or uncommon height in the chancel. The steps from the nave and on the chancel to the holy table are all in character and general conformity with the architecture of the building.

The report further stated that the two screens and the steps to the communion table were accurately shewn and described in certain plans which had been brought into the registry.

The opponents also brought in an affidavit which stated that the use of such a side chapel as in St. James', Hatcham, for the purpose of week-day services was not uncommon in churches, and that side chapels were in use in the following churches:—The parish churches of Bloxam and Burford, both in Oxfordshire; St.

Mary's, Shrewsbury; Christ Church, Hants; Romsey, near Salisbury; St. Paul's, Bedford; and Dorchester Church, Oxon.

W. G. F. Phillimore, for the opponents, on the cause being called on took a preliminary objection to the competence of the promovent to promote the suit, inasmuch as the proceedings in the case had been taken by Mr. Fry in his capacity of churchwarden, without the joinder of, and in opposition to, his co-churchwarden. He referred to *Fry* v. *Treasure* (1) and *Ritchings* v. *Cordingley*. (2)

Jeune, for the promovent, cited the *Churchwarden of Ensham* v. *Vicar of Ensham*. (3)

DR. ROBERTSON. Undoubtedly, there are many cases where proceedings to be held valid must be taken by churchwardens jointly: for instance, proceedings arising out of the rights of churchwardens in their corporate or quasi-corporate character. But here Mr. Fry is not in reality suing any one, but only appears before the Court to petition that certain alterations in the parish church may be sanctioned by the ordinary. I think the objection cannot prevail.

Phillimore, for the opponents (4), cited Phillimore's Ecclesiastical Law, p. 1770; *Best* v. *Best* (5); *Clutton* v. *Cherry* (6); *Westerton* v. *Liddell* (7); Gibson's Codex, 199; *Ridsdale* v. *Clifton*. (8)

Jeune, for the promovent, cited *The St. Ethelburga Faculty Case* (9); *Hudson* v. *Tooth* (10); *In re Church of the Annunciation, Chislehurst*. (11)

Cur. adv. vult.

Feb. 6. DR. ROBERTSON. This is a petition from Mr. Fry, who is the parish churchwarden of the new parish of St. James, Hatcham, in the diocese of Rochester, to authorize him to remove certain alterations and additions which

(1) 2 Moo. P. C. C. (N.S.) 539.
(2) Law Rep. 3 A. & E. 113, 117.
(3) 29 L. T. (O.S.) 402.
(4) The opponents began in accordance with the practice of the consistory court of Rochester.
(5) 1 Adams, 411, 416.
(6) 2 Phillim. 373.
(7) Moo. Sp. R. p. 77.
(8) 2 P. D. 276, 343.
(9) Not reported.
(10) 2 P. D. 125.
(11) See note at end of case.

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have been illegally made, viz., without a faculty, in the church of that parish, and also to enable him to make certain slight additions specified in the citation.

This petition is opposed by six parishioners, one of whom is Mr. Tooth, the vicar of the parish, and another is his churchwarden. The first objection to the prayer of the petition is that one churchwarden cannot act alone, as the promovent in a cause of faculty; but that the other churchwarden must be joined with him. The objection was taken as a preliminary one, and was disposed of by me before entering further into the case. The additions and alterations complained of, which were illegally introduced by Mr. Tooth, are eight in number.

[The learned chancellor enumerated the articles in respect of which a faculty to remove was prayed.]

The opponents in this cause object to the removal out of the church of the articles I have enumerated (some of which it appears have already been removed from the places they formerly occupied in the church), on the ground, firstly, that the removal would be repugnant to the feelings and wishes of the majority of the parishioners, and especially to such as are communicants and form part of the congregration; secondly, that the articles are for the most part presents, and that some of them have been for a long time in the church; and thirdly, that no one proposed to be removed is illegal or objectionable.

As to these objections I say that, as to the feelings of the majority of the parishioners, that question may be pretty well set at rest, for on looking to the result of the last Easter's election for a churchwarden, it appears that there were two candidates, Fry and Plimpton, and of these candidates Fry received about 150 votes, and Plimpton, one of the parishioners opposing the faculty now asked for, only received about thirteen votes. I am not concerned to inquire as to the feelings of those members of the congregation, who are not parishioners. The opponents also object that most of the articles sought to be removed, and averred to be presents to Mr. Tooth, have been long in the church. As to this the parishioners have themselves to blame, and ought to have complained at their very first introduction. It is also alleged that no one article proposed to be removed is illegal. Into that question I need not enter. With the view I take of the case, all of the articles were illegally introduced at the mere will and pleasure of Mr. Tooth, which he seems to consider quite sufficient, inasmuch as the prayer of the act on petition is as follows:—

[The learned chancellor read the prayer of the act on petition.]

The opponents do not even ask for a confirmatory faculty for the retention of the articles which have been introduced into the church. Though such a faculty is sometimes granted, I have never in the space of twenty-two years granted one, as I consider that the granting of confirmatory faculties is productive of great laxity. It seems in this case that at different times mobs took the law into their own hands by breaking and defacing what they considered objectionable; some of these acts were done before Fry was in office as churchwarden, and he swears he did not order or in any way sanction the damage done when he was in office. At the hearing I was told that it is not now the wish of the opponents to restore and replace the crucifix which has been damaged; whether they are unanimous I pretend not to say. It was likewise said that the communion table in the so-called

lady chapel which had been removed has been replaced. I say no more on this case than that I grant Fry's prayer: that the steps of the communion table in the chancel must be so arranged as to admit of the priest standing at the north side of the table, and that the communion table in the chapel, if there be one, is to be entirely removed. Of course I condemn the opponents in this case in costs.

The opponent, J. Bradford, appealed to the Court of Arches, and by the prayer of his appeal prayed the Court to reverse the decree entered in pursuance of this judgment, "so far as it rejected the act on petition, and decreed a faculty to issue for the removal of the screen with gates, separating the nave from the chancel in the church of St. James, Hatcham; another screen of wood in the said church, the two lower of the three upper or additional steps on which the communion table in the said church was raised, and for the setting up of the said screen of wood, or a portion thereof, around the north door of the said church, and so far as it condemned D. P. Waters, J. Plimpton, J. Thompson, R. A. Webb, and A. Tooth in costs."

On the 25th of February, 1878, before the appeal in the cause of *Bradford* v. *Fry*, had been lodged in the registry of the Court of Arches, a cause of faculty was instituted in the consistory court of Rochester, at the promotion of Thomas Bullard and Llewellyn Nash, two parishioners of the new parish of St. James, Hatcham, who in the petition to lead the citation in such cause, prayed the Court to grant a faculty authorizing the retention in the church of St. James, Hatcham, of the two screens and the two lower steps to the communion table, for the removal of which a faculty had on the 6th of February, 1878, been directed to issue by the chancellor of the diocese of Rochester, as above-mentioned.

On the 4th of March, 1878, an inhibition and citation in the appeal of *Bradford* v. *Fry*, issued out of the registry of the Court of Arches, inhibiting the chancellor of the diocese of Rochester, his surrogate, and also the said T. H. Fry, and his proctor, that neither they or any of them, pending the said cause of appeal, should do, or attempt to do, or procure to be done, anything to the prejudice of the said Jacob Bradford the appellant, so long as the appeal should be undetermined. On the same day, the inhibition was served on the registrar of the consistory court of Rochester, and he on the 18th of March, by letter, informed the solicitors for Messrs. Bullard and Nash, that the

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chancellor of the diocese of Rochester would not listen to any petition involving any point already determined in the above-mentioned judgment of the 6th of February, and considered that it would be a contempt of the Court of Arches to do so. Thereupon Messrs. Bullard and Nash appealed to the Court of Arches, alleging, as the ground of their appeal, the refusal and neglect of the chancellor of Rochester to grant his fiat for the issue of a citation to lead the faculty prayed for by them in the above-mentioned petition of the 25th of February, 1878, and to hear the matter of the said petition.

An appearance as respondent in the appeal of *Bradford* v. *Fry* was entered for Mr. Fry on the 15th of March, 1878, and on the 6th of June, 1878, Mr. Fry also appeared as respondent, under protest in the cause in which Messrs. Bullard and Nash had appealed as above stated, and which is referred to below as the appeal of *Bullard* v. *Fry*.

On the 16th of July, 1878, counsel for Messrs. Bullard and Nash moved the Dean of Arches to direct that the two appeals of *Bradford* v. *Fry* and *Bullard* v. *Fry*, might be appointed by the Court of Arches to be heard together. The motion came on for hearing at the same time as a motion on behalf of the respondent in *Bradford* v. *Fry*, praying the Court to appoint an early day for the hearing of such last-mentioned appeal, and after argument, the Dean of Arches, with the consent of counsel for all parties ordered that Messrs. Bullard and Nash should be at liberty to intervene in the appeal of *Bradford* v. *Fry*, for the purpose of praying for and obtaining from the Court a faculty "confirmatory of the two screens and the two lower of the three upper or additional steps on which the holy table is raised, in the said church of St. James, Hatcham, as appears by the proceedings in the said cause of appeal, and for no other purpose."

July 23. An appearance and intervention pursuant to the leave given by the Dean of Arches as above stated, having been entered in the appeal of *Bradford* v. *Fry*, such appeal came on to be heard.

W. G. F. Phillimore, appearing for the appellants and interveners, prayed the Court to reverse the decree appealed from and

to grant a faculty confirming the erection and retention of the two screens above-referred to and the two lower of the three upper or additional steps to the communion table, in the church of St. James, Hatcham. He submitted that the articles for the retention of which a confirmatory faculty was prayed were not illegal in churches of the Church of England, and therefore that as it had been proved that they had been placed in the church by the vicar of the parish and had remained there without objection for a lapse of time, the Court would, in its discretion, consider the interveners entitled to have such faculty granted to them on their paying the costs of obtaining it. *Gardner* v. *Ellis* (1); The Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8.

Jeune, for the respondent. The chancellor of the diocese of Rochester, in all the circumstances of the case as it was presented before him, exercised a right discretion in granting a faculty for the removal of the articles for the retention of which the interveners now for the first time ask the sanction of this Court. Such a confirmatory faculty as that asked for by the interveners ought not to be granted except at the petition of the vicar and churchwardens of the parish. [He referred to *Sieveking* v. *Kingsford*. (2)] The screen across the side chapel in the church of St. James, Hatcham, could only have been erected with the view that the holy communion might be celebrated in such chapel. The second communion table which was placed there has, however, been ordered to be removed as illegal: *Hudson* v. *Tooth* (3); and there can therefore be no object in separating the side chapel from the rest of the church. With respect to the screen with gates separating the nave from the chancel, since the decision of Dr. Lushington in the case of *Beal* v. *Liddell* (4) it must be considered as settled that a faculty ought not to be granted to sanction any chancel-screen whereby, as in the present case, a marked separation would be made between the nave and chancel of a parish church. *Westerton* v. *Liddell* (4); *In re St. Augustine, Haggerstone* (5); *The Vicar of the Church of the Annunciation, Chislehurst*, v. *The Parishioners of the Same*. (5) There is no evidence to shew that the

(1) Law Rep. 4 A. & E. 265.
(2) 36 L. J. (Ecc.) 1.
(3) 2 P. D. 125.
(4) Moo. Sp. R. 77.
(5) See note at end of case.

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additional steps which the interveners seek to have retained were in the church when it was consecrated, and the inference from the report of the architect which the opponents relied on in the Court below is to the contrary. The steps in question are, moreover, objectionable as having the effect of unduly raising that portion of the chancel where the communion table stands above the level of the rest of that part of the church.

LORD PENZANCE. The case raises questions of substance and some questions of form. I will in the first place deal with the questions of substance which are involved. The judgment of the chancellor of the diocese Rochester in this case dealt with eight objects, which according to the evidence before him were all placed in the church without the authority of a faculty, and he decided that that ground alone was a sufficient ground for their removal. In the Court below, although it was contended on behalf of the opponents that these articles or some of them ought not to be removed out of the church, nobody appears to have applied for a confirmatory faculty. The questions raised before me to-day have only had regard to three of the eight objects to which I have referred, and which are described in the 5th, 6th, and 7th paragraphs of the citation issued on the promotion of Mr. Fry. (1) Of these paragraphs the 5th relates to a screen, chiefly made of wood, with gates separating the nave from the chancel; the 6th to the three upper steps on which the communion table is raised, and of which the exact position is shewn on the plans referred to in the report of the architect who made an affidavit on behalf of the opponents in the Court below; and the 7th to a screen of wood separating what is called the lady chapel from the rest of the church. In point of substance what the Court has to decide to-day, is whether all or any of these three articles should be the subject of a confirmatory faculty, under the authority of which they might be retained in the church. Now, it is not denied that none of the three articles in question are illegal, their removal or retention in the church therefore is a question in the discretion of the Court. First, with regard to the screen in the south transept

(1) The paragraphs of the citation were numbered to correspond with the paragraphs of the petition.

which has been called the side chapel, I can see no useful purpose which it serves. At one time, indeed, before the removal of the communion table which formerly stood in the chapel, it may have been of some use, but I cannot see why it should be allowed to stand in the present condition of the church, except perhaps for the reason given in the report of the architect, that it conducts and reflects back sound into the body of the church. Now, it is very evident that the people seated in the south transept have the body of this screen, which is about nine feet high, interposed between them and the rest of the congregation. On that ground I think it is objectionable. The only other practical suggestion which has been made in favour of its retention is that if it remains service can be then more conveniently held in the south transept on occasions when the congregation is small; but in answer to this there is the fact that the church is not by any means a large church. These reasons for retaining it appear to me to be too trivial, and I cannot grant any confirmatory faculty authorizing the retention of this screen in the south transept.

With regard to the steps on which the communion table stands, I confess I think they are very objectionable. The chancel is raised above the nave in the first instance by three steps which are numbered in the plan 1, 2, 3, and raise the whole of that portion of the church. Then steps 4 and 5 again raise the whole body as it were of the east end of the chancel a certain number of inches above the nave. But when you are on step 5 you then meet with steps 6, 7, and 8, which are steps like those which form the pediment of a statue, or the pediment of any structure which is meant to be raised up. The effect produced is not a raising of the floor simply, it is making a sort of architectural structure which seems to be intended solely to raise up the communion table, which is very objectionable. I can quite understand that the respondent, who is taking a strong interest in this matter, feels that these steps give to the communion table somewhat of the character of a Roman Catholic altar, and upon that ground he would dislike it. On the other hand, I can see no possible reason for the retention of these steps, except the suggestion which was made that the raising of the communion table enabled the congregation to see the minister break the bread. If it were necessary for that purpose, it would be

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reasonable, but as far as I can judge from the photographs, there is no reason to fear that any difficulty would exist in this respect if the steps in question were removed, and in the absence of any such difficulty I think that reason falls to the ground. I shall certainly not grant any faculty for the retention of those steps. I do not make this decision on account of their preventing the minister from standing at the north end of the communion table, that is a strong objection, but that might be removed, as Dr. Phillimore suggested, by so altering step No. 7 to permit of the minister standing at the north end of the communion table. I am of opinion that no faculty ought in the circumstances of this case to be granted for the retention of the steps to the communion table.

Now as to the screen separating the nave from the chancel. Chancel-screens are not unusual in cathedrals and in parish churches of ornate character, and I do not see that the chancel-screen itself in the present case has any ceremonial signification which can offend the feeling of the parishioners, but I do think that the gates attached to the screen are objectionable for the reasons given by Dr. Lushington in *Beal* v. *Liddell.* (1) The height of the side panels in the base of the screen does not exceed 3 feet 4 inches, and above that height there are openings, and altogether the screen forms a handsome architectural ornament of the church.

On the whole I think the screen without the gates ought to be allowed to remain. With regard to the cross on the screen I can see no evil in it. It is an architectural ornament permissible in churches of the Church of England, and I think ought to be allowed to stand in the position it occupies. It has been proved that there were originally certain pictures on the panels of the screen, and that these pictures are now obliterated with black paint. I think the panels ought to be restored to decent form, and that they should not have any pictures on them but be decently painted. I do not think that the screen will obstruct the sound from passing from the chancel to the nave, or prevent the people in the nave from seeing into the chancel. Having regard to all these circumstances I have mentioned, I think the screen may be retained, but that the gates attached to it ought to be taken

(1) Special Reports by Moore.

away. It must also not be forgotten before I pass from this part of the case that the chancel-screen has been in the church nine years, and that until the commencement of the proceedings out of which this appeal has arisen no one had taken any step with a view to its removal.

I have now dealt with the several questions of substance in this case. I will next make some observations with regard to the questions of form involved. [His lordship then proceeded to state the material steps which had been taken, in the case in which Mr. Fry had been promovent in the Court below, and in the appeal entered by Bullard and Nash, and after observing that the interveners had appeared in the appeal of *Bradford* v. *Fry* with the consent of the respondent, and that it had been arranged that a confirmatory faculty might be prayed for by them, continued:—] Therefore I think it would not be right for the Court to deal with the questions raised in the appeal of *Bradford* v. *Fry*, as if there had been no intervention by Messrs. Bullard and Nash in the manner that I have stated, and in my opinion they have clearly under the circumstances obtained the right to have a confirmatory faculty for the retention of the chancel screen issued to them.

I shall accordingly order that the interveners shall be at liberty to take out such a faculty authorizing the retention in the church of the chancel-screen without gates, and with the panels I have referred to in decent condition without paintings or pictures on them. If the faculty be taken out within three weeks the decree of the Court below in favour of Mr. Fry is to be modified so as to allow the chancel-screen to be retained as I have stated. If the confirmatory faculty is not taken out within three weeks the decree made by the court of Rochester will stand affirmed, with the exception that the patron of the church will be at liberty to remove out of the church the screen in the south transept. In case no confirmatory faculty authorizing the retention of the chancel screen is applied for within the three weeks a faculty will issue to Fry out of this court authorizing its removal. The suit in which Fry was promovent in the Court below will be retained in this court, and if within three weeks the articles, other than the chancel-screen ordered by the Court below to be removed, are not

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removed, a faculty will be granted to Fry authorizing him to remove the screen in the south transept, if not then already removed, and all the articles ordered by the decree of the Court below to be removed, but then remaining in the church, and also to replace the tables of the commandments at the east end of the church, unless such tables have then already been replaced there.

My decision as to costs is, that Bullard and Nash are to bear the costs of the appeal here jointly with Bradford. The decree as costs made by the Court below is to be carried out. (1)

(1) The terms of the decree as entered in the registry were, omitting the immaterial portions, as follows:—

. . . . The judge having heard counsel for all parties, did on the 23rd of July, 1878, by his interlocutory decree, having the force and effect of a definitive sentence in writing, pronounce, decree, declare, and order that the cause be retained and the decree of the Court below be confirmed, subject to the following modifications, that is to say, did direct that after three weeks from the said 23rd day of July, 1878, a faculty should issue to the said Thomas Henry Fry, heretofore one of the churchwardens of the said new parish of St. James, Hatcham, on behalf of himself and others, the parishioners and inhabitants of the said new parish, authorizing him to remove a structure of wood in a recess on the north side of the said church known as a confessional box, the tablet of wood with folding doors affixed to the south wall of the said church on which a certain inscription and certain names had been made and inscribed, but which were then obliterated with black paint, certain music stands fixed to the floor which had been placed over a part of the vestry, the wooden structure with folding doors known as a triptych, affixed to the wall over the communion table, also the three upper or additional steps on which the communion table in the said church was raised, also a screen of wood then separating what is called the lady chapel from the rest of the church, but that the said Thomas Henry Fry should not be authorized to set up the said screen of wood separating the lady chapel from the rest of the church, or any portion thereof around the north door, and also wholly to remove the communion table in the said lady chapel, if not already removed, and also a wooden beam extending across the nave of the said church at a distance of about twelve feet from the ground, or so many of such articles and things as should not have been removed within the said time of three weeks, and also to replace the tables of commandments on either side of the communion table at the east end of the said church as they originally stood; and we did also further order and direct that the steps to the communion table in the chancel should be so arranged as to admit of the priest standing at the north side of the table, and we did further order and direct that the screen with gates separating the nave from the chancel of the church, the lower panels of which screen were formerly filled with paintings, but which were then obliterated with black paint,

In accordance with the leave given by the Court of Arches, as above stated, the solicitors for Messrs. Bullard and Nash, on the 13th of August applied in the registry for a confirmatory faculty authorizing the retention of the chancel-screen (1), and on the 16th of August the proctors for the respondent also applied that a faculty for the removal of the articles complained of should be granted, in accordance with the terms of the judgment of this Court, and in support of their application brought in affidavits in which it was stated, inter alia, that at the expiration of the term of three weeks from the delivery of the judgment the three upper or additional steps on which the communion table in the church of St. James, Hatcham, was raised had not been removed, but that a part only of the upper step had been cut away whilst the two lower steps remained in the same state as before. On the 28th of August notice was given on behalf of the interveners and appellant that they intended to move the Court of Arches for an order that the faculty, directed by the above judgment to issue after three weeks from the 23rd of July last to T. H. Fry, should not issue, inasmuch as the alterations in the church made or caused to be made by the said Bullard and Nash had been a complete and proper obedience to the order drawn up in pursuance of the said judgment, though failing to be a compliance with the letter of the said order in respect of the steps.

In support of the motion affidavits were filed which stated that the second communion table and the screen in the south transept had been removed out of the church; that the table of commandments had been placed on either side of the communion table at

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should also be removed, and we did direct the faculty to issue to the said Thomas Henry Fry to authorize him to remove the same unless within three weeks from the said 23rd day of July, 1878, the said Thomas Bullard and Llewellyn Nash shall remove the said gates attached to the said screen and restore the lower panels of the said screen to a decent and proper state without pictures, and unless within the said period of three weeks the said Thomas Bullard and Llewellyn Nash should have applied for a faculty confirming the erection or retention of the said screen so altered as aforesaid.

(1) On the 30th of August, on it appearing on affidavit that the gates originally attached to the chancel-screen had been removed, and that the lower panels of the same had been restored to a decent and proper state without pictures, a faculty authorizing the retention of the screen as it then was was issued to Messrs. Bullard and Nash.

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the east end of the church: and that there had been a strict literal compliance with the decree of the Court made on the 23rd of July, 1878, except as to so much of such decree as related to the steps on which the communion table had been raised. With regard to this point the affidavits contained allegations to the effect that the steps, on which the communion table was raised, had since the 23rd of July been so arranged as to admit of the priest standing at the north end of the communion table, and that since the hearing of the appeal it had been discovered that, in consequence of the removal of the uppermost of the three steps ordered by the decree of the Court of Arches to be removed, the communion table now stood on the actual steps, and at the same height above the level of the nave, on which it stood at the date when the church was consecrated.

Nov. 2. *Dr. Swabey*, on behalf of the appellant and interveners, moved the Dean of Arches in pursuance of the above stated notice of the 28th of August. The facts now for the first time brought to the notice of the Court render it reasonable that the decision of the Court with respect to the steps on which the communion table was raised should be reconsidered.

Jeune, for the respondent. The Court cannot now allow the matter to be reopened.

LORD PENZANCE. I am of opinion that this application cannot be granted or the case reopened. I do not say that in no case would the Court reopen a question of this kind, but I think a very strong ground ought to be made for doing so, because it is obvious enough that in discussions of this sort points of argument may escape attention at the time and rise up afterwards, or matters of fact may be slightly noticed or passed over altogether, which, if brought to the notice of the Court, might have had some influence on its decision. Probably hardly a case may have happened in which that sort of discovery might not be made, but to make that a common ground for reopening the question whenever such a state of things arose, would be contrary to the practice of all courts. The ground put forward in this case for reopening the question is that the Court proceeded on a certain view of what was the condition of this church at the time of consecration, and that

it was mistaken in that view, the fact being that when the church was consecrated it was in a different condition from what the Court supposed when the order of the 23rd of July was made. Well, I differ from that; the Court did not act at all upon what was the mere condition of the church at the time of consecration, and certainly had not any such view prominently before it when it came to the conclusion that upon the whole these steps to the communion table were quite unnecessary, and could be put to no use in any aspect of the matter which the Court ought in any way to regard. These steps being apparently perfectly useless, I saw no reason in principle why they should be allowed to remain, and the Court acted upon that general view. In other words, on the former occasion when the order of the 23rd of July was made, no valid reason could be assigned for the retention of the steps, and consequently the Court decided against their remaining in the church, and made the order that a faculty should issue for the removal of these steps, but that order did not proceed on the ground which is now put forward that the steps were not in the church at the time of its consecration. The application must be rejected and with costs.

On the 28th of November a faculty, under the seal of this Court, issued out of the registry of the Court of Arches, empowering Mr. Fry to remove the three additional steps referred to in the above judgment of the Dean of Arches, or as much of such three steps as had then not been removed in accordance with the above-mentioned decree of the 23rd of July, 1878.

Solicitors for appellant and interveners: *Chapman, Turner, & Pritchard.*

Proctors for respondent: *Moore & Currey.*

[IN THE CONSISTORY COURT OF LONDON.]

May 14.

IN RE ST. AUGUSTINE, HAGGERSTONE.

[IN THE COMMISSARY COURT OF CANTERBURY.]

THE VICAR OF THE PARISH OF THE ANNUNCIATION, CHISLEHURST *v.* THE PARISHIONERS OF THE SAME.

THESE were two causes of faculty instituted for the purpose of obtaining the sanction of the ordinary to the erection of chancel-screens with gates, in the

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parish churches of St. Augustine, Haggerstone, in the diocese of London, and of the Annunciation, Chislehurst, in the diocese of Canterbury, respectively.

No appearance was entered in either case.

Feb. 27, 1877. Both cases came on for hearing before Dr. Tristram, the chancellor of the diocese of London, and commissary-general of the diocese of Canterbury.

Jeune, appeared for the vicar of the Church of the Annunciation, Chislehurst. He referred to the following authorities: Peacock's English Church Furniture, p. 166; Wheatly on the Common Prayer, pp. 74, 94; *Westerton* v. *Liddell* (1); Gibson's Codex, 2nd ed. p. 199; Phillimore on Ecclesiastical Law, p. 177; *Newson* v. *Bawldry* (2); Scudamore's Notitia Eucharistica (ed. 1872), pp. 143, 151, Cardwell Doc. Ann. vol. i. pp. 357, 398; *Clifton* v. *Ridsdale*. (3)

Cur. adv. vult.

May 14, 1877. Separate judgments were delivered in the two cases.

IN RE ST. AUGUSTINE, HAGGERSTONE.

Post 115.

DR. TRISTRAM. The vicar and churchwardens of the parish of St. Augustine, Haggerstone, with the sanction of the vestry, have petitioned the Court to issue a faculty authorizing the erection, between the chancel and the nave, of a dwarf wall, not exceeding in height two feet one inch, with entrance gates.

To the dwarf wall, having regard to its dimensions, there is no objection, but it would be a departure from the general practice of the Court to grant a faculty authorizing the introduction of gates to a chancel-screen in a parish church.

The only reported case in which the question of chancel-screens with gates has been under consideration, is that of *Beal* v. *Liddell* (1), in which Dr. Lushington, sitting in this court, refused to order the removal of the chancel-screen with brazen gates, in the church of St. Barnabas, Pimlico, both of which were there at the time of its consecration, on the ground that, as they were not clearly contrary to law, his wisest course was to abstain from exercising any discretionary power with which his office might be invested, but he added, that in his opinion such separations between the chancel and the nave were objectionable, and that he should not advise a bishop to consecrate a church so fitted up. (1)

Since the delivery of this judgment in December, 1855, it has been the practice of the Court to refuse to issue faculties authorizing the erection of gates to chancel-screens, or of chancel-screens making an unusual and marked separation between the chancel and the nave. In the present case the Court is asked to depart from the rule so laid down by Dr. Lushington. The petitioners did not appear by counsel, but I had the advantage of hearing an argument from Mr. Jeune on the points urged, in the case of the church of the Annunciation, Chislehurst, a case involving the same questions which came before me as commissary-general of the diocese of Canterbury, and which, for convenience, was heard immediately after the application now before the Court.

One argument advanced by Mr. Jeune in favour of chancel-gates was shortly

(1) Moo. Sp. R. 77. (2) 7 Mod. 70. (3) 1 P. D. 316.

this: that before the Reformation, chancel-screens were a necessary adjunct to a parish church, being generally surmounted with a crucifix called the rood; that gates are the proper appendages to chancel-screens; that though the rood was directed to be removed, and the rood-loft to be altered (see Articles of Archbishop Grindal, October 10th, 3rd Elizabeth), yet the then existing screens were allowed to remain (see Remains of Archbishop Grindal, p. 154, edition by the Parker Society), and that the rubric in the second Prayer Book of Edward VI. 1552, immediately before the morning prayer which is retained in our present Prayer Book, having directed "that the chancels shall remain as they have done in times past," a literal compliance with the rubric would seem to require a chancel-screen of some sort in all our churches. Such is the construction put upon this rubric by Bishop Gibson, in his Codex (at page 199, 2nd ed.), who there refers, and adopts the words of a note in Dr. Nicholls' Additional Notes on the Common Prayer, by Bishop Cosins, first published in 1710, interpreting the rubric as "requiring the chancel to be distinguished from the body of the church by a frame of open work," "against which distinction," Bishop Gibson adds, "Bucer inveighed vehemently, as tending only to magnify the priesthood, but though the king and parliament yielded so far as to allow the daily service to be read elsewhere, if the ordinary thought fit, they would not suffer the chancel to be taken away or altered." But this construction of the rubric is not in accordance with contemporaneous or continuous usage. Thus, Bishop Beveridge (one of the authorities cited), in a sermon preached in November, 1681, at the opening of the parish church of St. Peter, Cornhill, remarked that that was the only church of those built in the city since the great fire of London, in which the chancel was separated from the nave by a screen, and proceeded to vindicate the presence of the screen, not on the ground that it was placed there in compliance with the requirements of this rubric, which had then been re-enacted only twenty years before, but by reason of its conformity with the long-continued usage of the Christian Church. (1) Moreover, in the faculties which from time to time since the date of the rubric had been issued from this Court, authorizing the restoration of or alterations in churches, it has never been deemed imperative to require the chancel to be separated from the nave.

The construction contended for also is at variance with the expression of opinion by Dr. Lushington in *Beal* v. *Liddell* (2) to which reference has been made.

The presence of chancel-screens in churches, with or without gates, being neither illegal nor imperative, the question whether either or both are to be allowed is left in the discretion of the ordinary, and in this matter he should exercise a judicial and not an arbitrary discretion.

The arguments in support of the application addressed to the discretion of the Court were that the application was unopposed, and that the gates would serve as a protection to the ornaments left in the chancel, and to the music books belonging to the choir, when the church was left open during week days in order to be a resort for the poor.

The circumstances that no parishioner appears to oppose the faculty is in

(1) 6 Bp. Beveridge's Works, Anglo-Cath. Library, 367–388.
(2) Moo. Sp. R. 77.

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favour of the petitioners, but the ordinary in granting faculties is bound to consider future as well as present parishioners, and even present parishioners may not without reason refrain from incurring the trouble or expense of opposing a faculty, in the expectation that the Court will take care that nothing is done manifestly to their prejudice, or which may do unnecessary violence to the religious feelings of any parishioner. What the articles were that would really require special protection, or if there were any such things, why they could not be conveniently removed for protection, did not clearly appear; but a gate of 2 ft. 1 in. in height could form no effectual barrier against depredation.

As gates of such dimensions would be unavailing for the purpose of affording security, their significancy can only be construed to be for the purpose of exclusion, and to signify that the chancel is of a sacred character distinguishable from that of the rest of the church. Before the Reformation the gates would be placed there (and appropriately) with such significancy, as by the canon law the chancel had such character impressed upon it, and was reserved exclusively for the clergy; but the Reformation made an alteration in this respect, and since that time a lay rector has been entitled to the chief seat in the chancel, and the other seats in it have been and are generally in the disposition of the ordinary for the use of the parishioners.

The introduction of gates as importing this significancy may cause offence to some parishioners present or future, and may be construed as indicative of making the parish church the church of a party. Our Prayer Book was originally framed and subsequently revised with the aim of making it acceptable to all parties in the Church, whilst the ordering and regulating of alterations to be made from time to time in the sacred building, in which the liturgy was to be used, in matters not expressly provided for, has been left advisedly in the discretion of the ordinary. To issue faculties from this Court authorizing such alterations in a parish church as might make such church unacceptable to any of the parishioners, to whom the liturgy is acceptable, would not, in my judgment, be a wise exercise of the discretion vested in the Court.

I see no good reason for departing from the general rule established by Dr. Lushington, and I therefore reject that part of the prayer of the petition which asks the Court to sanction the erection of gates attached to the chancel-screen; the faculty may go for the other alterations desired.

THE VICAR OF THE CHURCH OF THE PARISH OF THE ANNUNCIATION, CHISLEHURST *v.* THE PARISHIONERS OF THE SAME.

DR. TRISTRAM. The Rev. Henry Lloyd Russell, the vicar of the parish of the Annunciation, Chislehurst, has petitioned in this case for a faculty authorizing certain alterations and decorations in the chancel of the parish church, one of the said alterations being the erection of a chancel-screen of considerable height, in one point 13 ft. 1 in. from the floor of the chancel, in other parts higher, with entrance gates and a large cross on the top of the screen in its centre, 2 ft. 9 in. in height, and 2 ft. 1 in. across the upper part.

The plan of the proposed screen was, according to the practice of the diocese, submitted to his grace the Archbishop of Canterbury for his grace's approval before the citation issued, and his grace declined to indorse his approval of it.

I had the advantage of hearing Mr. Jeune in support of the application, who

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directed the attention of the Court to the various authorities bearing on the question. I have already stated in my judgment delivered in the Consistory Court of London, in the St. Augustine Haggerstone case (1), that I should adhere to the rule laid down by Dr. Lushington in relation to chancel-screens and gates, and that rule will also govern this case.

This case however differs from the former one in the description of the separation proposed by the plan to be made between the chancel and the nave, and in the erection of a large cross at the top of the screen in the centre in the position formerly occupied by the rood.

In reference to the plan of the proposed screen the gates come within the rule laid down by Dr. Lushington, and the cross in the centre, having regard to its position and dimensions, might, I think, give offence. I therefore decline to issue a faculty for the erection of the screen according to the plan; but if the petitioner wishes to make modifications in it, such as shall receive the sanction of his grace the Archbishop of Canterbury, I should be prepared to grant a faculty for the chancel-screen as so altered.

It being intimated that the petitioner is content that the faculty should issue for the erection of the screen without the gates and the cross, my decision will be that as the screen does not in any way impede the view, the faculty may go for all the matters prayed, except for the gates and present cross, but the Court will sanction the erection of a cross of smaller dimensions.

Proctor for petitioner in *Russell* v. *Parishioners of The Annunciation, Chislehurst: Brooks.*

[IN THE COURT OF APPEAL.]

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March 31.

THE SWANSEA *v.* THE CONDOR (1878 P. 16.)

Collision—Inevitable Accident—No Light—Neglect of Rule—Costs of Successful Appeal.

An action for damages by collision in the Thames was brought by the owners of a barge against the owners of a steamer. The steamer had been obliged to alter her course in order to avoid another barge, and the barge with which the collision took place was last of three in tow of a tug, and did not carry a light as directed by the rules of the Thames Conservancy; but there was no evidence that the want of a light contributed to the collision:—

Held, reversing the decision of the Admiralty Court, that the steamer was not to blame, and that she might have acted differently if the barge had carried a light.

The action was dismissed without costs, but, *semble*, that in successful Admiralty appeals the appellants will have the costs of the appeal.

THE plaintiffs were the owners of the barge *Swansea*, which at midnight on the 20th of October, 1877, was going up the Thames below London Bridge, the last of three barges in tow of a steam

(1) Ante, p. 112.

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launch. The launch carried the regulation lights, but the *Swansea* had no light. The *Condor*, a steamer of 434 tons register, was coming down the river towards the south shore. Her engines had been stopped, but in order to clear a barge they were turned slowly ahead and her helm was starboarded. In order to clear the launch and the three barges the *Condor's* helm was then ported and the engines were reversed, but her bow struck the *Swansea* on the port side and did damage for which this action was brought. The other facts of importance in this case are stated in the judgments.

The action was tried before Sir R. J. Phillimore, Judge of the Admiralty Court, and two Elder Brethren of the Trinity House, on the 20th of June, 1878.

Milward, Q.C., and *Phillimore*, for the plaintiffs.

Butt, Q.C., and *Clarkson*, for the defendants, the owners of the *Condor*.

SIR R. PHILLIMORE. This is a case of collision which happened about midnight or later on the 24th of October, 1877, in the river Thames, opposite the Aberdeen Steam Wharf.

The vessels which came into collision were the *Swansea* a dumb barge in tow of a tug called the *Jane*, and a steamship called the *Condor*. The stem of the *Condor* went into the port midships of the *Swansea*, abaft her beam, and did her considerable damage. The state of the weather may be taken, both on the admissions of the *Condor* and on the general result of the evidence, to have been what is well known and often described in this court as "clear but dark," and the pilot of the *Condor*, in his evidence, states distinctly that it was a night on which lights could be seen at a reasonable distance. The main defence was, as it appears, and as I think was hardly denied by the counsel for the *Condor*, that looking to the crowded state of the river and other circumstances, the collision was the result of unavoidable accident. In the first place, I have consulted the Elder Brethren on the nautical points of the case, of which there are several which present themselves, more for their opinion than for mine; and we have no doubt whatever that the *Jane* with her three barges, two immediately astern of her and one immediately astern of the two, was properly navigated on the north side of the midchannel, with this

one exception, that she disobeyed the rule of the Thames Conservancy, which was binding on her, and which is in these words: "The person in charge of the sternmost or last of a line of barges, when being towed, shall exhibit, between sunset and sunrise, a white light from the stern of his barge." There was a clear infringement of this rule here, for no such light was exhibited from the stern of the last barge. The defence that the parties were ignorant of the existence of the rule, and that it was generally not observed is, in my judgment, not valid, and I should be very sorry that anything I should say should by any possibility lead to the conclusion that the Court would listen to such a defence as this. But under the 17th section of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), the Court is at liberty to consider whether the disobedience to the rule I have referred to did or did not contribute to the collision in this case. The Elder Brethren are very clearly of opinion, and I agree with them, that it did not contribute to the collision. What is necessary for the decision of this case may be stated in a few words. The *Condor's* engines had been stopped previous to clearing a single barge that was lying about mid-river. Those on board the *Condor*, it appears from the evidence, had seen the lights of the tug *Jane* with barges in tow crossing her bows. Now, if the pilot of the *Condor* had not set her engines on, as he did, until the tug and the barges which the tug was towing had passed clear of her, there would have been, in the judgment of the Elder Brethren, in which I agree, no collision. The collision was caused by the *Condor* going ahead before the tug got clear. The Elder Brethren are also of opinion that the tug *Jane* was quite right in going full speed, as by so doing the chance of a collision was lessened. I must, therefore, pronounce the *Condor* alone to blame for the collision.

Judgment for the owners of the Swansea.

The owners of the *Condor* appealed. The appeal was heard on the 31st of March, before James, Baggallay, and Bramwell, L.JJ., and two nautical assessors.

Butt, Q.C., and *Clarkson*, for the owners of the *Condor*. The barge ought to have carried a light, otherwise it might not be

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possible to see how many barges were being towed. The *Condor* could not have done otherwise than she did. The collision was, perhaps, unavoidable, and in that case the action ought to have been dismissed without costs. It is said that the tug, having these barges astern, could not stop, but vessels in such a position cannot complain of other vessels.

Milward, Q.C., and *Phillimore*, for the owners of the *Swansea*. It is admitted that the rule as to the last barge carrying a light is not usually followed, and it is clear that the want of a light did not in any way cause the collision. The best thing the tug could do was to go on and try to clear the *Condor*, and the tug is not to blame for not stopping.

JAMES, L.J. Having had the opportunity of considering this case with our nautical assessors, who have very carefully read the evidence, and have heard the representations made, we find ourselves unable to concur with the judgment given in the Court below, bearing in mind the state of the river, and the fact that the *Condor* was obliged to do something to get out of the way of a barge which was there in mid-channel, and that the *Condor* did nothing, in our opinion, except the very smallest thing that could be done, to give her headway to get away from the barge. There was nothing that was bad seamanship, or negligent, or improper in the conduct of the *Condor* in getting away from the first barge as she did, which, however, did bring her into the place where the collision occurred with the steam-tug and barges which were going up the river—and it is not an immaterial thing to consider—going up the river at full speed—as great a speed as the tug could go with a strong flood tide, and at two or three knots an hour in addition. Then, the *Condor* was placed in this additional difficulty by a matter in which we cannot agree with the decision of the Court below—that was the absence of the light. It is quite clear that the steam-tug, with its train of barges, in coming up the river in the way I have said, did violate the express rule of navigation of the Thames by not having a light on the stern of the barge which should have carried it; the object of which must be to give everybody having anything to do with the navigation of the river notice of what it is they are likely to come into collision with. If

the barge had shewn that light, it is impossible to know what would have been the conduct of the master and pilot of the *Condor* on seeing that light, and knowing that the tug and the barges were coming full speed up the river, incapable of stopping themselves. If the steam-tug had been, like the *Condor*, a vessel without the burden of barges behind, it seems to me to be as much the duty of the steam-tug to stop as of the *Condor*; their duty would have been the same with regard to one another—that is, with reference to the *Condor* and the steam-tug. But though the steam-tug could not stop, there was no notice given to the *Condor* that that was the state of things; there was nothing to inform the *Condor* of the fact that there was a train of barges behind the tug, and, in the absence of that intimation, the circumstances were so likely to throw the *Condor* into a difficulty that I cannot consider that we ought to hold the master of the *Condor* to blame for not having done that which he might have done; or, rather, for having done that which he probably would not have done, if he had known what the state of things was, and if he had had that full information which he ought to have received from the tug and barges, by the exhibition of that light which plainly by the rules ought to have been exhibited.

BAGGALLAY, L.J. I am of the same opinion. It appears to me that the *Condor* was in a position of very considerable difficulty. The navigable portion of the stream is very narrow at that point, and there were a number of barges about. There being a strong adverse tide she had occasion to keep her engines going to a certain extent, in order to overpower the tide and to steer properly. I am unable to take the same view that was taken in the Court below as to the absence of a proper light on the stern of the last barge in the tow, and it appears to me that, having regard to all the circumstances, the *Condor* adopted a reasonable course, and the accident was the result of circumstances which could not have been avoided by her. In point of fact, she might have a right to assume, seeing only the lights on the steam-tug and no other light indicating where the tow ended—she might fairly assume that there were only one or two barges at the stern of the steam-tug; and had there been no more, the accident would not

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have occurred, for the first two barges passed by safely, and it was only the additional barge which had no light on it that was struck. I agree, therefore, with James, L.J., that the judgment of the Court below should be reversed.

BRAMWELL, L.J. I am of the same opinion. Mr. Milward was unable to shew why it was wrong for the *Condor* to put way on her as she did, and I could not think it was wrong in itself, unless she had some reason to suppose that there was something for her to run against, and I cannot see there was such a reason.

Butt, Q.C., and *Clarkson*, asked for the costs of the appeal.

Milward, Q.C., and *Phillimore*, contended that there ought to be no costs of a successful appeal: *The Marpesia.* (1)

JAMES, L.J. With regard to the question of costs in this case, it is quite clear that there has been a general impression in the profession that the old rule of the Court of Privy Council should be followed, and there is colour for that in the decisions which the registrar has handed up to us; and it appears that this Court in a particular case decided in that way. We think that requires great consideration, and we doubt whether it can be right that there should be one rule as to costs in one branch of the High Court of Justice, and another rule in another branch of the High Court of Justice. I think, in future, the rule will be that the costs in every case follow the result, as in other branches of the High Court, but we certainly are not prepared to apply that rule for the first time in this case of the *Condor* unless the occasion itself were a right one. I am not satisfied with the evidence given on behalf of the *Condor*, and on the general facts of the case and all the circumstances, and with regard to the former decisions of this Court, I think we should dismiss the action without costs. I think, however, that it may be considered as settled that there will be no difference in future in the rule as to the costs.

Action dismissed without costs.

Solicitors for the *Swansea*: *Waltons, Bubb, & Co.*
Solicitor for the *Condor*: *W. Batham.*

(1) Law Rep. 4 P. C. 212.

THE ROBERT DIXON. (1879 J. 173.)

1879
Feb. 24.

Salvage—Towage Contract—Counter-claim.

A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract.

A tug agreed to tow a ship from Liverpool round the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and the weather becoming worse during the performance of the agreed towage service, the hawser parted, and the ship was placed in a position of danger, and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost:—

Held, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains.

THIS was an action of salvage instituted on behalf of the owners of the steam-tug *Commodore* against the ship *Robert Dixon*.

The statement of claim alleged in substance as follows:—

The steam-tug *Commodore* is a first-class tug, belonging to the port of Liverpool.

The *Robert Dixon* is a ship of 1368 tons register, belonging to the port of New York, and is of the value of 11,000*l*.

On the 18th day of March last, the *Commodore* having been engaged to tow the *Robert Dixon* from Liverpool to the Skerries for a sum of 49*l*., passed her 12-in. hawser on board and paid out the full scope of it (ninety fathoms), and towed the vessel out of dock and down the river, crossing the bar at about 5·30 P.M.

At this time the wind was from the northward; a strong breeze, the sea moderate, and the vessel was being towed three-quarter speed or five to six knots an hour on a W. by N. ½ N. course.

Shortly before 10 P.M. the wind was increasing considerably and the sea rising, and at about 11, the wind still increasing, and the ship sagging to leeward owing to her being light, she was hauled up to N.W. by W., and at about 11·30 to N.W., being then abreast of Point Lynas, a strong gale blowing and the ship pitching very heavily.

At 12·30 the course was altered again to N.W. ½ N.; it was then blowing a whole gale, and the ship labouring heavily, the tug towing her at about a knot and a half an hour, and at about 1 A.M. the hawser parted on board the ship, owing to its having been made fast in a negligent and improper manner. The Skerries bore at the time W. by S., distant eleven miles, Point Lynas S., distant nine miles, and the Ormes Head S.E. by E., distant about nineteen miles.

The tug then hailed the ship to wear round with her head to the eastward, but the channel pilot on board replied that that was impossible, and that they were drifting in rapidly, and hailed the tug to come and take hold of them again.

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Between that time and 2·30 A.M., the tug made several efforts to get hold of the vessel, but she could not succeed in getting hold, and at the time aforesaid, the ship having drifted to within three miles of the shore off Bull Bay, she was hailed by the tug to let go her anchors, which she did.

After the ship's anchor had been let go she dragged to leeward, and the tug was hailed to go and take off those on board of her, but owing to the sea that was running it was impossible for the tug to get near the ship which was then within two miles of the shore, and still drifting to leeward.

The tug hailed the vessel to get her own hawser ready, and after several attempts a heaving-line was got on board, the ship's hawser got over her port bow and made fast, and the tug then went ahead with a scope of about thirty fathoms in a northerly direction, stopped the vessel from dragging further, and held her up to her anchors until about 4·30 o'clock.

At this time a heavy squall from the northward struck the tug, canting her with her head inshore, and obliging her to slip the hawser. The ship at this time had drifted so far as to shut in the Skerries light, and was still drifting in towards the shore.

At about 5 A.M. the tug got close under the stern of the vessel, and a life-line was passed, and one of the tug's life buoys hauled on board.

The ship was then hailed to get in her hawser, but it appeared that several of the crew refused to work; an attempt was, however, made by some of them, but given up in about an hour; a line was then made fast to the hawser, and the hawser was let go from the ship and hauled on board the tug by means of her screw-winch. It was then about 9·30 o'clock. The tug commenced towing ahead, and so continued till 12 o'clock.

The tug then proceeded to tow the vessel . . . . until she had a good offing about seven miles N.W. of the Skerries, when the tug let go. It was then about 6·30 P.M.

By means of the above-mentioned services, the tug rescued the vessel and those on board her, from a position of imminent peril; the said services were wholly beyond the scope of those which the tug had agreed to render, and in performing them those on board the tug displayed great courage and skill, incurred considerable risk both to the tug and themselves; the tug herself sustained damage to the amount of about 150*l.* and was detained for ten days in repairing the same, and also lost a hawser, certain lines, ropes and life-buoys, of the value of about 70*l.*

But for the said services the said vessel must have gone ashore and become a total wreck, and the lives of those on board would probably have been lost.

The defendants, the owners of the ship *Robert Dixon*, by way of defence and counter-claim alleged in substance as follows:—

The *Commodore* had towed the *Robert Dixon* into the port of Liverpool, and the master of the *Robert Dixon* had promised to let the *Commodore* have the tow out on the usual terms. On the forenoon of the 18th of March one of the plaintiffs, or one of the managers for the owners of the *Commodore*, urged the master of the *Robert Dixon* to allow his vessel to be towed to sea that day. The master of the *Robert Dixon* refused because the weather was threatening. Afterwards on the same day the master of the *Commodore* came to the master of the

Robert Dixon, and urged him to go to sea that day, and offered if the *Robert Dixon* would do so that he would put the ship round the Skerries for the rate to the Skerries, and would provide a towing hawser without charge. On these terms the master of the *Robert Dixon* agreed to be towed to sea that day.

The towing hawser provided by the *Commodore* was old and worn out, and was not reasonably sufficient for the purpose. The *Robert Dixon* was in ballast trim, and was towed on a course which, having regard to the trim of the vessel and the state of weather was an unsafe and an improper course. Those in charge of the *Commodore*, although requested by those on board the *Robert Dixon* to tow further from the land, for a long time improperly neglected so to do, and the *Robert Dixon* was by reason of such neglect suffered to drift far to leeward.

During the night the wind increased and the sea rose, and when at last the *Commodore* began to tow the ship to windward the hawser parted. The hawser was properly made fast, and was not made fast in a negligent and improper manner.

After the hawser had parted the *Robert Dixon* was drifting in towards the shore, and the *Commodore* negligently omitted to make proper efforts to get hold of the *Robert Dixon*.

The starboard anchor of the *Robert Dixon* was let go, which brought the ship's head to wind, and the ship's hawser was then passed to the *Commodore*, but was cut adrift. Shortly afterwards the port anchor of the *Robert Dixon* was let go, and both chains were paid out to the full length, when the ship was brought up, and she lay securely at her anchors. The *Commodore* rendered no assistance during the night.

At daylight the *Commodore* came round on the ship's quarter, and those on board endeavoured to create a panic amongst the crew of the *Robert Dixon* by hailing them to leave the ship.

In the forenoon the wind and sea moderated, and the ship's hawser, which had got foul, was cleared, and given to the *Commodore*, in order that she might hold the ship up to her anchors, and the crew of the *Robert Dixon* manned the windlass, and tried to get one of the anchors. The *Commodore* did not bring the ship up to her anchors, and after towing a little while the master of the *Commodore* said that if the *Robert Dixon* did not at once slip her anchors he would leave her. The crew of the *Robert Dixon*, being unable to weigh the anchors without the assistance of the tug, were compelled to slip both anchors. About 1 P.M. the cables were slipped, and the *Commodore* proceeded with the *Robert Dixon* in tow.

The *Commodore* about 6.30 cast off, when the *Robert Dixon* proceeded on her voyage under sail.

At the time the agreement to tow was entered into the weather was dirty and threatening, and although the wind and sea afterwards increased, the change of weather was only what the parties contemplated at the time the agreement was entered into, and nothing occurred to change the character of the services agreed to be rendered.

The defendants deny that the *Commodore* incurred any risk as alleged, or sustained damage and loss as alleged, and they deny that the *Robert Dixon* was in a position of imminent peril, or of peril, or was rescued from a position of imminent peril as alleged.

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If the *Commodore* did incur any risk, or damage, or loss, it was by reason of the negligence and improper conduct of those in charge of the tug, and if the *Robert Dixon* was at any time in a position of peril, the peril was occasioned by the negligence and improper conduct of those in charge of the *Commodore*, and the *Commodore* did nothing to rescue her from such position.

Save as hereinbefore admitted the defendants deny the claim, and they say that the plaintiffs did not perform any service in the nature of salvage service, and if they did they have by reason of their misconduct forfeited all claim to salvage remuneration.

The defendants have paid into Court the sum of 49*l.*, the sum agreed to be paid for the services rendered, and they say the plaintiffs are not entitled to any further sum.

COUNTER-CLAIM.

By way of counter-claim the defendants say that the master of the *Commodore* agreed with the master of the *Robert Dixon* for reward to tow the *Robert Dixon* from Liverpool round the Skerries, and to provide a fit and proper towing hawser for the service. The master of the *Commodore* took the *Robert Dixon* in tow on the terms of the said agreement, but he towed her in a negligent and improper way, and towed her with a towing hawser which was unfit and improper for the said service, and the owners and master of the said tug were guilty of negligence in providing such unfit and improper towing hawser, and by reason of the premises the said towing hawser broke when the *Robert Dixon* was on a lee shore, and it was necessary for those on board the *Robert Dixon* to let go both anchors to prevent the ship drifting on shore, and afterwards the master of the *Commodore* neglected and refused to enable those on board the *Commodore* to get the anchors, and threatened to leave the *Robert Dixon* unless the chains were slipped, and those on board the *Robert Dixon*, being unable to get the anchors, were compelled to slip the chains, whereby the chains and anchors were lost. Those on board the *Commodore* further negligently and improperly cut a towing hawser of the *Robert Dixon*, and damaged it to the extent of 40*l.* On her arrival at her port of destination, the *Robert Dixon* being without anchors and chains, her master was compelled to employ a tug at an expense of 40*l.* The value of the anchors and chains lost as aforesaid was about 375*l.*

The defendants claim the said sum of 375*l.*, and the said several sums of 40*l.*, amounting together to 455*l.*

The plaintiffs by their reply denied the principal averments in the defence, and as to the counter-claim alleged as follows:—

The plaintiffs admit the agreement therein set forth, and say that during the performance of the same both the ship and tug encountered dangers, and the tug performed services wholly beyond the scope of the contemplated employment, and entitling the plaintiffs to salvage remuneration.

Feb. 20, 21, 24. The case was heard by the judge assisted by two of the Elder Brethren of the Trinity Corporation. Witnesses on behalf of the plaintiffs and defendants were examined orally

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in court, and the depositions of witnesses examined abroad on commission on behalf of the defendants were put in and read.

The evidence on behalf of the plaintiffs and defendants supported the allegations in their respective pleadings. Among other witnesses who were examined were pilots from the Liverpool pilot boats, who described the course taken by the *Commodore*.

The defendants proposed to give evidence in support of the items of the counter-claim, but on the counsel for the plaintiffs objecting to evidence as to these details being given at the hearing, the Court directed that in case the counter-claim should be sustained, the items should be referred to the registrar assisted by merchants.

Butt, Q.C., and *Potter*, for the plaintiffs. The steam-tug was not guilty of any negligence, and she incurred risks and performed duties which were not within the scope of the towage contract made with the master of the *Robert Dixon*.

Milward, Q.C., G. Bruce, and *F. W. Raikes*, for the defendants. The towage agreement entered into by the master of the *Commodore*, was entered into with full knowledge that, owing to the state of the weather, something more than ordinary towage service was required. Moreover, the danger from which the plaintiffs claim to have rescued the *Robert Dixon* was occasioned by the improper and negligent navigation of the steam-tug, and in consequence the plaintiffs are not entitled to claim as salvors. *The Minnehaha.* (1) The slipping of the anchors and cables and the losses consequent thereon were caused by the negligence of the tug, and must be borne by the plaintiffs.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. There are certain propositions which are agreed upon, or cannot be denied, relative to this case, which it may be convenient to state before I proceed to pronounce my decision upon the merits of the case itself. This vessel, the *Robert Dixon*, a ship of 1,368 tons register, at the time when the plaintiffs allege that the salvage service commenced, was off Bull Bay, within a quarter of a mile of the shore. There is no doubt,

(1) Lush. 335.

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first, that she was in a position of considerable danger, the wind blowing directly upon the shore; and, secondly, that she could only be rescued from that danger by the help of steam power; nor can it be doubted, as matter of law, that if the vessel, that came up to her and whose services were refused, or any other vessel except the *Commodore* had towed her out of that position, such vessel would have been entitled to salvage. The defence raised here, however, is not that the *Commodore* did not perform what would have been in its general character salvage service, but it is alleged that having regard to the circumstances under which the agreement of towage was entered into, nothing occurred to change the character of the services agreed to be rendered, and that if the *Robert Dixon* was brought into a position of peril, it was owing to the negligence of the plaintiffs.

The *Commodore* was engaged as a tug to tow this large sailing vessel clear of the Skerries, and she impliedly contracted of course to find adequate power, knowledge, and skill, for the performance of this service. The vessel, however, came into the position of danger, which I have mentioned, and the *Commodore* now makes a claim in this Court in the character of a salvor, because she says that that danger was the consequence of supervening circumstances over which she had no control. In answer to this claim, the defendants have raised two points, the first of which is the breaking of the hawser by which the *Robert Dixon* was being towed. With regard to this, looking to all the circumstances of the case, namely, that it was patent to the master of the *Robert Dixon* that the hawser was chafed; that the master's attention was drawn to it, and he refused to allow his hawser to be used; that the river pilot saw it, and was of opinion that it was inadequate; and that it had been used from five to one o'clock, when a heavy sea came on suddenly; I do not think, and the Elder Brethren agree with me, that the contention that the master of the *Commodore* was to blame for having attempted to tow the vessel with an improper hawser can succeed.

The second point which raises a more serious question remains, and is this, namely, whether the tug, if she had pursued a proper course, would have been compelled to place the sailing ship in a position of danger. It is important to remember that the weather

had been bad for some time, and that at the time when the towing was begun it was seen to be very doubtful. Now, the course the tug ought to have pursued was a north-west course; the course she says she pursued is thus stated in the statement of claim: "The wind was from the northward, a strong breeze, the sea moderate, and the vessel was being towed three quarter's speed, or five to six knots an hour, on a W. by N.½N. course." It appears from the evidence of the master of the tug himself that he received orders from the pilot to steer a W.N.W. course. The contention on the part of the defendants with regard to this part of the case is, that, according to the evidence, the master of the tug steered a course which brought him inside the pilot-boat No. 6, although to have gone outside the pilot-boat would have been a course of, comparatively speaking, perfect safety, and a course that at the same time two other vessels pursued. Now the master of the tug says that at eleven o'clock he put the vessel's head to N.W. by W. of his own accord. Unfortunately, it was too late to regain the ground he had lost, and this necessitated the vessel being placed in a position of considerable danger. Now, it is a matter very much for the Elder Brethren of the Trinity House to advise the Court on a point of this description—as to whether there was a want of common prudence and skill in going to leeward; and as to whether it was consistent with common prudence to have taken that course in the then state of the weather; and they are clearly of opinion that it was not,—that it was an imprudent course to have pursued. The consequence was that the sailing vessel was driven within a mile and a quarter of the shore, and was placed in a position of jeopardy resulting from the imprudence of this navigation on the part of the tug. That being the opinion of the Elder Brethren, it is impossible to come to any other conclusion than that the *Commodore* did not act as a salvor, but, on the contrary, was to blame. We are, however, clearly of opinion that though the master acted imprudently he acted in good faith, and we have no reason to believe, nor is it suggested, that he endeavoured to induce the crew to leave the vessel, or that he purposely placed her in a position of danger, or in any way intentionally misconducted himself. We think that he did not

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give that skill and prudence which he tacitly contracted to give when he engaged to tow the vessel. It may be as well to refer to the very careful language used by the Judicial Committee of the Privy Council in the case of *The Minnehaha* (1), in the following passage :—

> Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default. When it is remembered how much in all cases—how entirely in many cases—the ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult the detection of such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy.

I am of opinion, after receiving the advice of the Elder Brethren, that this case is brought within the scope of these observations of their Lordships of the Privy Council, in this case of *The Minnehaha* (1), and that the tug "materially contributed to the danger" in which this vessel was placed. It remains only to consider the other part of this case, namely, the part of the counter-claim by which the defendants claim to be reimbursed for the loss occasioned by reason of the *Robert Dixon* having been obliged to slip both her anchors. Inasmuch as I am of opinion that the loss of these anchors and chains was a consequence of the imprudent navigation of the tug, I must refer the matter to the registrar and merchants to ascertain their value, and the amount of the loss which was so caused. I must pronounce for the tender, and for the damages claimed by way of counter-claim in respect of the loss of the anchors and chains, subject to a reference to the registrar and merchants.

Solicitor for plaintiffs: *Ayrton.*
Solicitor for defendants: *Neal.*

(1) Lush. 335, at p. 348.

THE PARLEMENT BELGE. (1878. O. No. 60.)

1879
March 15.

Jurisdiction—Warrant to arrest Mail Packet belonging to Foreign State—Treaty-making Power of Crown—Collision.

A packet conveying mails and carrying on commerce does not, notwithstanding that she belongs to the sovereign of a foreign state and is officered by officers commissioned by him, come within the category of vessels which are exempt from process of law; and it is not competent to the Crown, without the authority of Parliament, to clothe such a vessel with the immunity of a foreign ship of war, so as to deprive a British subject of his right to proceed against her.

Rev'd 5 P.D. 197. CA.

THIS was an action of damage instituted on behalf of the owners of the steam-tug *Daring* against the steamship *Parlement Belge* and her freight. The writ was issued on the 16th of February, 1878, and was duly served, but no appearance was entered in the action, and on the 4th of January, in this year, the plaintiffs delivered their statement of claim. Such statement of claim alleged in substance, inter alia, as follows:—

At about 4.30 P.M. on the 14th of February, 1878, the steam-tug *Daring* brought up to an anchor in Dover Bay, within the port and harbour of Dover, about half-a-mile east of Dover pier.

In the course of the evening a fog began to rise from off the shore. About 10.30, P.M., the fog still continuing, the *Daring* was riding in the same place, having her anchor regulation light duly exhibited and burning brightly, her fog-bell rung at proper intervals, and a good look-out kept on board her.

In these circumstances the paddle steamship *Parlement Belge* . . . ran her stem right into the starboard side of the *Daring*, cutting into her about fourteen feet, and doing her a great deal of damage.

The collision was caused by the bad navigation and negligence of those on board the *Parlement Belge*.

The *Parlement Belge* is a Belgian vessel, and was and is now employed in the service of carrying the mails between Dover and Ostend in Belgium.

Before and since the time of the collision in question she was engaged in carrying, besides the mails, passengers and merchandise and in earning passage-money and freight.

The plaintiffs are unable to discover whether the *Parlement Belge* was at the time of the collision, or is now, the property of his Majesty the King of the Belgians, or whether she was only chartered for the purpose by his Majesty, or by some officer or officers of his Majesty's Government. They have caused application to be made to the Government of his Majesty to give them compensation for the damage done to them, but have been unable to obtain such compensation.

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The statement of claim then claimed, inter alia,

Judgment against the *Parlement Belge*, her tackle, apparel, and furniture, for the damage occasioned to the plaintiffs by the collision, and for the costs of this action.

A warrant to arrest the *Parlement Belge*, her tackle, apparel, and furniture, and if necessary a sale thereof.

On the 4th of February, 1879, counsel for the plaintiffs moved the judge in Court to direct that judgment in the action, with costs, should be entered for the plaintiffs; that the accounts and vouchers relating to the damage sustained in the action might be referred to the registrar and merchants to report thereon, and that a warrant might issue for the arrest of the *Parlement Belge*.

The Admiralty Advocate (*Dr. Deane, Q.C.*), appeared on behalf of the Crown, in opposition to the motion, and the Court directed that the hearing of the case should be adjourned for formal argument; the Crown having liberty, if so advised, to shew cause why the warrant applied for by the plaintiffs should not be refused on the ground that the *Parlement Belge* was, in the circumstances of the case, exempt from the jurisdiction of the Court. (1)

On the 24th of February the following information and protest was filed in the registry:—

The Attorney General, under protest on behalf of her Majesty the Queen, gives the Court to understand and be informed as follows:—

1. Before and at the time of the alleged collision, and thenceforward till the present time, the *Parlement Belge* was one of the mail packets running between Ostend and Dover, and one of the packets mentioned in Article VI. of the convention of the 17th of February, 1876, hereinafter referred to.

2. During the period hereinbefore mentioned, and at all material times, the said packets were and are the property of his Majesty the King of the Belgians, and in his possession, control, and employ as reigning sovereign of the state of Belgium, and have been and still are public vessels of the government and sovereign state of Belgium carrying his said Majesty's royal pennon, and were and are being navigated and employed by and in the possession of such Government, and not otherwise.

3. The said packets were and are officered by officers of the Royal Belgian Navy holding commissions from his Majesty the King of the Belgians, and in the pay and service of his Government. The said officers are appointed by, and are under the control and orders of the Belgian minister of public works.

(1) The motion was again called on on the 18th of February, and was further adjourned in order that the Crown might raise the question of jurisdiction in a formal manner.

4. During the period hereinbefore mentioned, and at all material times, a convention dated the 17th of February, 1876, has been and is in force between her Majesty the Queen and his Majesty the King of the Belgians, to a copy of which, in the French and English language, the defendants crave leave to refer as if the said convention were duly set forth at length herein.

5. During the period hereinbefore mentioned and at all material times, the *Parlement Belge* was carrying the public mails under the said convention between and for the Royal Post Offices of Great Britain and Belgium.

6. The Attorney General, under protest, says that this Honourable Court has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same therein.

7. The Attorney General under protest as aforesaid, gives the Court to understand and be informed herein, but he does not admit the matters alleged in any of the paragraphs of the statement of claim to be true.

The protest concluded with the following prayer:—

Wherefore the Attorney General, on behalf of her Majesty the Queen, prays the Court to stay all proceedings in this action, and to dismiss the motion of the plaintiffs with costs to the Attorney General on behalf of her Majesty, of and incident to this application and action. (1)

The following are the material portions of the treaty referred to in the protest:—

CONVENTION between her Majesty and the King of the Belgians, regulating the Communications by Post between the British and Belgian Dominions.

Signed at London, February 17, 1876.

[*Ratifications exchanged at London, March* 24, 1876.]

HER Majesty the Queen of the United Kingdom of Great Britain and Ireland, and his Majesty the King of the Belgians, being desirous of strengthening the friendly relations which unite the two countries, and wishing to regulate by special arrangements (forming a sequel to the General Postal Treaty concluded at Berne on the 9th of October, 1874) the postal relations between their respective Offices, have named as their Plenipotentiaries for this purpose, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Edward Henry Stanley, Earl of Derby . . . her Majesty's Principal Secretary of State for Foreign Affairs, &c. &c., and the Right Honourable John James Robert Manners (commonly called Lord John Manners) . . . her Majesty's Postmaster-General;

And his Majesty the King of the Belgians, Baron Henry Solvyns, . . . Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of the Belgians to her Britannic Majesty, &c. &c.;

(1) The information and protest was signed by the Attorney General.

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Who, after having reciprocally communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I.

There shall be between the Post Offices of Great Britain and Belgium a periodical and regular exchange of correspondence of every kind in international service as well as in transit.

ARTICLE II.

* * * * * * *

ARTICLE III.

The mails between Great Britain and Belgium shall be conveyed by means of special packets running between Ostend and Dover.

Each Office shall have the right to employ subsidiarily, and so far as it shall be of any advantage on the score of speed, the route *viâ* France, and the French packets from Calais to Dover, for the conveyance of its correspondence in closed bags to the other Office.

With regard to the mails conveyed on account of other Offices, it will be the duty of the despatching Office to indicate the route to be followed.

ARTICLE IV.

The Post Offices of Great Britain and of Belgium shall fix by a mutual agreement, the time for the departure of the packets from Ostend and Dover, and they shall regulate this service in connection with the railway trains, so as to insure with the greatest possible speed, the transmission of mails for international as well as for transit service.

ARTICLE V.

The Belgian Government shall continue to perform, at its own expense, the double daily service for the conveyance of the mails from Ostend to Dover and *vice versâ* (a service which must be performed at least six days in the week, the service on Sunday being optional).

ARTICLE VI.

The packets employed for the conveyance of the correspondence between Ostend and Dover shall be steam-boats of sufficient power and size for the service in which they are to be employed. They shall be vessels belonging to Government or freighted by order of Government. (Ce seront des bâtiments appartenant à l'État ou frêtés pour le compte de l'État.)

These vessels shall be considered, and treated (reçus) in the port of Dover and in all other British ports at which they may accidentally touch, as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed, demand.

They shall be exempted in those ports, as well on their entrance as on their departure, from all tonnage, navigation, and port dues, excepting, however, the vessels freighted by order of Government, which must pay such dues in those ports where they are levied on behalf of corporations, private companies, or private individuals.

They shall not be diverted from their especial duty—that is to say, the conveyance of the mails—by any authority whatever, or be liable to seizure, detention, embargo, or arrêt de prince. (Ils ne pourront être détournés de leur destination spéciale, c'est-à-dire du transport des dépêches, par quelque autorité que ce soit, ni être sujets à saisie, arrêt, embargo, ou arrêt de Prince.)

ARTICLE VII.

The captains of the Belgian packets shall receive from the agents appointed for the service of exchange, the mails at Ostend and at Dover; the bags being closed and sealed.

The number of these bags and the time of their delivery shall be entered on a way-bill, which the captains or the officers entrusted under their orders with the care of the mails, shall deliver on their arrival to the office for which they are destined.

They shall bring back to the despatching office a certificate of the punctual delivery of the mails, delivered to them by the agent who shall have received them.

ARTICLE VIII.

Unless prevented by causes over which they have no control, the captains of the packets engaged in carrying the mails between Ostend and Dover shall proceed directly to their destination.

If in consequence of stress of weather or damage, they should be compelled to alter their course, and to put into any other port than Ostend or Dover, they must justify such deviation in the manner that their respective Offices shall deem advisable.

Whenever a packet conveying mails shall be compelled to put into any other than its destined port, the captain shall immediately deliver the mails to the local post-office, or forward them towards their destination, under the charge of an officer of the vessel.

ARTICLE IX.

* * * * * * *

ARTICLE X.

The mail packets shall be at liberty to take on board or land at Dover, as well as at other British ports where they may be obliged to put in, any passengers of whatever nation they may be, with their wearing-apparel and luggage, and also with their horses and carriages, on condition that the captains of the said packets shall conform to the regulations of the United Kingdom concerning the arrival and departure of travellers. They shall be prohibited from conveying goods or merchandize on freight, with the exception, however, of postal packets and small parcels the weight of which shall be limited by mutual agreement between the two Offices. (Ils ne pourront transporter aucune marchandise à titre de fret, à l'exception toutefois des colis postaux et des articles de messagerie dont le poids sera limité de commun accord entre les deux Administrations.)

ARTICLE XI.

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ARTICLE XII.

The captains of the packets specially engaged in the conveyance of the respective mails of the two Offices are forbidden to take charge of any letter not included in their mail bags, with the exception, however, of Government dispatches.

They must take care that no letters are conveyed illegally by their crews or passengers, and must give information in the proper quarter of any breach of the laws which may be committed in that respect.

ARTICLE XIII.

In case of war between the two nations, the mail packets shall continue their navigation without impediment or molestation, until a notification is made on the part of either of the two governments that the service is to be discontinued, in which case they shall be permitted to return freely, and under special protection, to the port in Belgium where they were fitted out.

ARTICLE XIV.

The British Government engages to pay annually to the Belgian Government, in consideration of the advantages which it derives from the double daily packet service between Ostend and Dover, viz.:

1. For the night service, the sum of four thousand pounds sterling; and
2. For the day service the sum of five hundred pounds sterling.

These sums shall be paid quarterly to the Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of the Belgians at the Court of her Britannic Majesty.

It is understood that the British Government shall be at liberty to terminate such payment on giving to the Belgian Government a notice of at least six months; and that even without such notice, the payment of either or both of the above-mentioned sums shall be lawfully discontinued at any time that the Belgian Government should cease to perform either a portion or the whole of the service.

ARTICLE XV.

The two governments engage to cause to be conveyed, by the means which the respective Post Offices employ for their own business, the closed mails which one of the Offices may wish to exchange, through the medium of the other Office, with countries which are not parties to the General Postal Union.

The one of the two Offices on whose account this conveyance shall take place, shall pay to the Office performing this service, in consideration of the distance traversed beyond the limits of the Union, rates which shall be determined by mutual agreement between them, and which shall not exceed the rates to be determined for the despatch of correspondence in open mails, in conformity with Article XI. of the Treaty of Berne, of the 9th of October, 1874.

ARTICLE XVI.

In order to secure the whole of the receipts upon the correspondence passing between the two countries, the British and Belgian Governments engage to prevent by every possible means the said correspondence being sent by any other way than by their respective Posts.

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ARTICLE XVII.

The Post Offices of Great Britain and Belgium shall determine by mutual agreement, in accordance with the conditions laid down in the Treaty of Berne of the 9th of October, 1874, the matters of detail connected with the execution of the present Convention, as well as all other arrangements deemed necessary for regulating the postal regulations between the two countries.

ARTICLE XVIII.

The present Convention, which abrogates and takes the place of all previous postal arrangements concluded between Great Britain and Belgium, with the exception of those relating to Post Office money orders, shall come into force immediately after the exchange of the ratifications.

It is concluded for an indefinite period, each party reserving to itself the right to terminate it at any time upon giving at least twelve months' notice to the other party of its intention in this respect.

ARTICLE XIX.

The present Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the present Convention, and have affixed thereto the seal of their arms.

Done in duplicate, at London, the seventeenth day of February, in the year of Our Lord one thousand eight hundred and seventy-six.

(L.S.) DERBY.
(L.S.) JOHN MANNERS.
(L.S.) SOLVYNS.

Feb. 25. The protest was brought on for argument together with the plaintiffs' motion for judgment.

In support of their motion the plaintiffs relied on affidavits which verified the allegations in the statement of claim, and alleged that search in the records at the offices of Her Majesty's customs in Dover, had been made for the dates of the voyages which the *Parlement Belge* had made between the ports of Ostend and Dover, between the 1st of January and the 31st of March, 1878; that by the said records it appeared that between such dates the *Parlement Belge* had made thirty voyages from Ostend to Dover and from Dover to Ostend respectively; that on twenty-nine of such voyages from Ostend to Dover, and on twenty-five of such voyages from Dover to Ostend, she had carried passengers and merchandise, in addition to the mails, and that, in addition to the mails, passengers and a general cargo had been carried by her on the voyage on which she was proceeding when the collision

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occurred. On the point that the *Parlement Belge* was engaged in commerce, the plaintiffs also relied on an affidavit filed on the 16th of February, 1879, in which George Henry Gregory deposed, in terms as follows:—

I did on the 8th of February, 1879, attend at the office of the Continental Daily Parcels Express, to make inquiries as to the conveyance of goods and merchandise from London to Belgium viâ Dover and Ostend, by the mail boats, and in reply to my inquiries, I was handed the exhibit marked with the letter A, hereunto annexed.

2. By a reference to page 5 thereof, it appears that the said Continental Daily Parcels Express has been in existence for the last thirty years, and further, that they ship their goods to Belgium by the mail-boat, viâ Ostend. I asked the gentleman in the office of the said Continential Daily Parcels Express whether there was any other means by which they sent to Belgium, and the reply was, "No, we can only ship by the mail boats, viâ Dover and Ostend."

3. By reference to page 9 of the exhibit A, it appears there is no limit as to size or weight of the parcels that are so shipped; the printed tariff on the said page going up to 200lbs., but stating as to the rate generally, as well as to the special rates to Ostend alone, that an additional charge is made for every 10 lbs. according to the tariff.

The nature of the exhibit referred to in the above affidavit appears from the judgment. The following copy (omitting immaterial portions) of the frontispiece of the same, may, however, be usefully set out here.

The Original
CONTINENTAL DAILY PARCELS EXPRESS,
known on the Continent as the Agence Continentale,
the Proprietor of which is by Special Convention
in direct correspondence with the Belgian Government Railway,
the Imperial Post of Germany,
the Federal Post of Switzerland,
and the Northern of France Railway,
for the conveyance by
THE GOVERNMENT MAIL PACKETS
viâ Dover, Ostend, and Calais,
of
Samples of every description, Papers, Plans, Books,
Articles for private use, Luggage
and Packages of all kinds, up to 200 lbs. weight,
between England and the Continent.
At fixed and moderate rates of Carriage and Insurance.

London: Chief Office, 53, Gracechurch Street,
1st February, 1879.

All former rates and conditions are withdrawn.

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Webster, Q.C., and *W. G. F. Phillimore*, on behalf of the plaintiffs:—The plaintiffs have taken all the steps necessary under the practice of the Court in default causes, and unless the Crown are able to shew conclusively that the *Parlement Belge* was, when the collision occurred, exempt from the jurisdiction of this Court, they are entitled as of course to an order in the terms of their motion. The plaintiffs' affidavits prove that at the time of the collision the *Parlement Belge* was carrying cargo and earning freight, not as an exceptional case but in the ordinary course of her employment. The first point for the Court to decide on considering the question of jurisdiction must therefore be, whether the *Parlement Belge* has not, by assuming the character of a trader, waived any privilege of exemption from the jurisdiction of this Court to which her employment by the Belgian government might have otherwise entitled her: *The Charkieh* (1); *Taylor* v. *Best* (2); *The Constitution.* (3) Moreover, not only has the *Parlement Belge*, by carrying merchandise waived the privileges she now claims, but she has thereby expressly contravened the provisions of Article X. of the postal convention referred to in the protest, and shut herself out from any benefit to be derived from the provisions of the VIth article of the same. Still, although a decision on the question of waiver would dispose of the case, the plaintiffs cannot admit that, either by general international law or by virtue of the provisions of the convention, the *Parlement Belge* is exempt from process of law. By 3 & 4 Vict. c. 65, s. 6, and the Admiralty Court Act, 1861, 24 Vict. c. 10, s. 7, the legislature has conferred a statutory right on the owners of a ship damaged by a collision to obtain in this Court redress by proceedings in rem, and this statutory right extends to all cases, except where the enforcement of it would be an infringement either of the common law, of which the law of nations forms a part (Stephen's Blackstone, vol. 1, p. 489, note), or of some subsequent and inconsistent provision of the legislature. In the present case there is no difficulty in shewing that no infringement of international law would take place if the *Parlement Belge* should be arrested, for the privilege of exemption from process of law, which the vessels of a foreign prince enjoy by the

(1) Law Rep. 4 A. & E. 59, 89. (2) 14 C. B. 487. 18 Jun 4.02

(3) Supra, p. 39.

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comity of nations, is confined to vessels of war; in other words, to vessels which form part of the armed force of the nation: *The Exchange* (1); and a foreign state cannot, by describing a trading vessel belonging to it as a vessel of war, gain for her privileges which she would not otherwise possess. The case of *Morgan* v. *Larivière* (2) is material on this point, and shews that the property of a sovereign prince in this country is not necessarily privileged from process of law.

[They referred to *The Helen* (3); *The Bellona* (4); *The Cybele.* (5)]

If the plaintiffs are right in their contention that the *Parlement Belge* is not a vessel privileged from arrest by international law, the only question which remains is whether the jurisdiction of the Court has been ousted either by the provisions of a statute or by some act of the Crown, either sanctioned by the legislature or valid as the exercise of a power which the sovereign still legally possesses. It must, however, be assumed, that the convention of February, 1876, which is relied on as entitling the *Parlement Belge* to the treatment of a vessel of war, does not appear to have been sanctioned or confirmed by parliament; the validity of the convention as a whole can, therefore, be only supported on the ground that it is within the category of those treaties which by constitutional law are binding upon the subject without such sanction or confirmation. The onus of shewing that this is so rests upon the Crown. The Crown, in fact, must contend that those provisions of the treaty, which purport to confer a special immunity unknown to international law on the *Parlement Belge*, are not, so far as their operation would deprive a British subject of a right secured to him by statute, such as the right of action the plaintiffs claim in this case, ultrà vires. Such a contention is untenable, and the contrary proposition that it is not in the power of the sovereign of this country without the sanction of the legislature to contravene the provisions of an Act of Parliament, is supported by the authority of accredited writers on constitutional and international law. Thus it is stated in Wheaton's International Law (by Lawrence, ed. 1864), p. 457 :—

Commercial treaties, which have the effect of altering the existing laws of trade

(1) 7 Cranch, American Rep. 116.
(2) Law Rep. 7 H. L. 423, 430.
(3) 3 Rob. 224.
(4) Edw. 63.
(5) 2 P. D. 224; 3 P. D. 8.

and navigation of the contracting parties, may require the sanction of the legislative power in each state for their execution. Thus, the commercial treaty of Utrecht, between France and Great Britain, by which the trade of the two countries was to be placed on the footing of reciprocity, was never carried into effect; the British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty. In treaties requiring the appropriation of moneys for their execution, it is the usual practice of the British Government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose.

[On the same point, they also relied on Lord Mahon's History of England, vol. 1, p. 49; Halleck, International Law, ed. 1878, vol. 1, pp. 229, 232–238; Vattel, Droit de Gens, l. 2, c. 12, s. 154 (ed. 1830), and Field, International Code, tit. 4 ch. 14, s. 192, p. 80; Blackstone's Comm. (ed. 1844) vol. 1, bk. 4, ch. 7, p. 249.]

On the one hand, it must be admitted that with respect to some treaties relating to peace and war the power of the Crown to bind British subjects is uncontrovertible; but, on the other hand, it is no less true that there are certain treaties and conventions with foreign states which are of no force or validity unless confirmed by Parliament. In support of this proposition it will be sufficient for the plaintiffs to refer to the following Acts of Parliament, by which the legislature have either confirmed existing conventions or treaties, or have given power to the sovereign by order in council to render arrangements made by the Crown with foreign states binding on British subjects: the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), ss. 58, 59, 60, giving power to her Majesty to apply the regulations for preventing collisions at sea, the provisions of the English law as to life salvage, and the English rules of tonnage measurement, to foreign ships; the 22 Geo. 3, c. 46, to carry into effect a truce with the former colonies of the Crown in America; the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 1, giving her Majesty power by order in council to apply the provisions of that Act in the case of any foreign state; the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 37, giving her Majesty power to apply certain provisions of the Merchant Shipping Acts to foreign vessels; 7 Vict. c. 12, and 15 Vict. c. 12, relating to international copyright: 2 & 3 Vict. c. 96, and the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 6, 7, 66, relating to the sea fisheries on the coast of France

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and the exemption of sea fishing boats from dues; 35 & 36 Vict. c. 45, confirming the treaty of Washington; and 38 & 39 Vict. c. 22, confirming the postal treaty of Berne, which treaty is referred to in the treaty relied on in this case, and is to a great extent of a precisely similar character.

The convention in this case, if construed in the manner suggested, *i.e.* as taking away the right of the plaintiffs to recover damages in respect of the collision, is tantamount to a grant by the Crown that the King of the Belgians shall not be sued in this country; but such a grant is clearly void: Viner's Abridgment, Prerogative (Sc.); Comyns' Digest, Prærogative, D. 33; 2 Rolle's Abridgement, p. 201, pl. 45. The treaty in question ought to be construed liberally, and so as not to interfere with private rights; and if the treaty be so construed, it will be found that the language of Article VI. is fully satisfied, if its provisions are construed as solely referring to immunity from seizure by act of the Government: Cussey, Phases et Causes Célèbres du Droit Maritime des Nations, tome 1, liv. 1, tit. 2, s. 49, pp. 120, 121.

[They also referred to *Long* v. *Bishop of Capetown* (1), and *Attorney-General* v. *Bishop of Manchester*. (2)]

Sir H. S. Giffard, S.G., The Admiralty Advocate (*Dr. Deane, Q.C.*), and *Bowen*, on behalf of the Crown:—The *Parlement Belge* is not subject to the jurisdiction of this Court. The vessels to which the treaty of the 17th of February, 1876, applies are not ordinary traders. It is contemplated by the provisions of the Xth article of the treaty that they should carry postal packets, and the provisions of that article have not been contravened by the *Parlement Belge*, for up to the present time the post-offices there referred to have made no agreement as to the weight of the parcels to be carried; and even although the *Parlement Belge* may have infringed the provisions of the article, such infringement would not render the treaty invalid or at an end, but at the utmost would only lead to correspondence between the two governments concerned. The Court can put no other construction on the provisions of the VIth article of the treaty than that the words contained in it, taking all together, are amply sufficient to confer on the vessel proceeded against in this case, so

(1) 1 Moo. P. C. (N.S.) 411. (2) Law Rep. 3 Eq. 436.

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long as she is within a British port, all the privileges which by the comity of nations have been conferred on public national vessels. Among these privileges is the privilege of freedom from civil process of every description, a privilege which must be considered as given by the common law: 7 Anne, c. 12; *Triquet* v. *Bath* (1); and not only to such public national vessels as are armed, but to all other vessels which, like the *Parlement Belge*, belong to the sovereign of a foreign state in his public capacity. It follows as a consequence that, even apart from the postal treaty with Belgium, the *Parlement Belge* must be free from arrest in this action: *The Exchange.* (2) Whatever may be the effect of the treaty in question here, and for the purposes of the present case its provisions must be held to be not ultrà vires, it clearly affords evidence on what terms the *Parlement Belge* came within the jurisdiction of this Court—that is to say, under an implied licence that she would be treated in all respects as a vessel of war. How can the terms of this licence be disregarded by this Court? The plaintiffs have cited numerous instances of treaties confirmed by Parliament, but the fact that other treaties have been so confirmed by no means proves that this treaty requires confirmation before its provisions can become binding on British subjects.

The treaty of February, 1876, in effect declares that the *Parlement Belge* is a public vessel owned by the government of Belgium, and that by reason of this circumstance she has become entitled by international law to be treated as if she was a vessel of war. Surely it was competent for Her Majesty to make such a declaration? and such a declaration having been made, is this Court to be at liberty to treat it as of no validity? Whether a vessel be armed or not, she is equally privileged by the comity of nations, if she belongs to a sovereign prince in his public capacity: *The Prins Frederik* (3); *De Haber* v. *The Queen of Portugal* (4); Wheaton, International Law (by Lawrence, ed. 1864), p. 196; *The Exchange* (2); *The Santissima Trinidad* (5); *Briggs* v. *The Light Ships.* (6) Can it be said that the unarmed yacht of

(1) 3 Burr. 1478.
(2) 7 Cranch, 116.
(3) 2 Dod. 451.
(4) 17 Q. B. 171.
(5) 7 Wheat. 283.
(6) 11 Allen (Massachusetts) 157.

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the King of the Belgians would not be privileged from arrest in our ports? The American frigate *Constitution*, though carrying cargo, was recently held by this Court entitled to the immunity of a vessel of war on the ground that she was engaged in a public employment. (1) On this point the decision in the case of *The Charkieh* (2) may also be cited in favour of the Crown, for there the Court thought it necessary, even though the vessel was a trader, to inquire whether she belonged to a sovereign prince. If the plaintiffs succeed it will be the first time in the history of this country that a foreign vessel, invited into our ports under an implied promise of immunity from process of law, has been subjected in invitum to the jurisdiction of this Court.

The main contention on behalf of the plaintiffs has been that the treaty-making power of the Crown is inoperative except when the subject matter of the treaty relates only to peace or war, but this contention cannot be supported either on principles of constitutional or of international law. It may indeed be conceded that there are some treaties which, so far as municipal law is concerned, may not be binding on British subjects until they are ratified by Parliament, but whether a particular treaty is or is not binding on the subject proprio vigore can only be ascertained by examination of how far each provision contained in it is effectual in law. For this reason the argument that certain specified treaties have been confirmed by the legislature must be of little or no value. In the present case the treaty before the Court is an act of state emanating from the sovereign, and determining the diplomatic status of the vessels described in it. As such an act of state it is binding on this Court, and on all subjects of the Crown, without the confirmation of Parliament; and inasmuch as the *Parlement Belge* has clearly brought herself within its provisions, it must be the duty of the Court to accord her all the privileges which are incidental to the status thereby conferred on her.

That it is within the province of the sovereign alone to determine the status of foreign powers and things is a proposition of constitutional law which will scarcely be denied. Indeed, how else can the Courts of this country be rightly informed on such subjects? For, to use the words of Blackstone: "It is evident

(1) Ante, p. 39. (2) Law Rep. 4 A. & E. 59.

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that with regard to foreign concerns the sovereign is the delegate or representative of his people, and what is done by the royal authority is the act of the nation, what is done without the royal concurrence is the act of private men:" 2 Stephen's Blackstone (ed. 1863), p. 506. On this point the authority of Lord Coke is most pertinent, for in a passage relating to the inrolment of leagues and safe conducts, he certainly assumes that the king possesses the power of deciding what aliens shall have the status of suitors in our courts, thereby affording a complete illustration of the legality of the power which the Crown claims to have exercised in this case: 4 Inst. ch. 26, p. 152. For other illustrations it is only necessary to refer to the undoubted power which the sovereign alone possesses with respect to the recognition of foreign governments and the status of belligerents: *The City of Berne* v. *The Bank of England* (1); *The Columbian Government* v. *Rothschild* (2); *The United States of America* v. *Wagner* (3); *The Cherokee Nation* v. *The State of Georgia* (4); Wheaton, International Law (by Lawrence, ed. 1864), pt. i. ch. ii. p. 40; Proclamation as to the war between the United States and the Confederate States of America: British and Foreign State Papers, vol. 51, p. 165. The power of the Crown with respect to licences to trade with the enemy, the definition of what articles ancipitis usûs are to be considered contraband of war, the legitimation of foreign coin (Chitty on the Prerogative, p. 199), and the recognition of diplomatic officers, may also be instanced as examples of acts of state not deriving their validity from the confirmation of the legislature. The declaration of Paris with respect to maritime belligerent rights (Hertslet's Treaties, vol. 10, p. 547) is a far greater exercise of the power which is by the constitution vested in the sovereign than the exemption of the public vessel of a friendly nation from arrest.

It cannot be that the power of the Crown in this respect can have been affected by the statutes giving the subject a right to proceed in this Court. All such statutes must be read salvo jure regio, and their provisions can in no wise affect the question as to the right of the Crown to enter into any treaty, or the validity of

(1) 9 Ves. 347.
(2) 1 Sim. 94.
(3) Law Rep. 2 Ch. 582.
(4) 5 Peters, 1.

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its operation when made. The plaintiffs contend that the *Parlement Belge* cannot claim any immunity from arrest, inasmuch as she has contravened the provisions of the treaty conferring on her such immunity. The principles of the municipal law which govern the contracts of private individuals cannot, however, be rightly applied to treaties, and indeed it is a well-known proposition of international law that a treaty does not, in consequence of the breach of its provisions, become void, but that it is merely voidable at the option of the contracting parties: 1 Halleck, Int. Law, 268 (ed. 1878); 1 Kent, Comm. 175 (ed. 1873). It cannot be in accordance with public policy that vessels like the *Parlement Belge*, belonging to a foreign government, and maintained by that government expressly for the purposes of the postal service, should be liable to arrest by process of law.

Webster, Q.C., was again heard on behalf of the plaintiffs.

Sir H. S. Giffard, S.G., replied on the whole case. (1)

Cur. adv. vult.

March 15. SIR ROBERT PHILLIMORE. In this case questions of international and public law of the gravest importance have been raised.

The Court has to acknowledge the great assistance which it has derived from the learned and able arguments of counsel, especially valuable in a case which is, I believe, primæ impressionis, and which must be decided upon general principles and analogies of law, rather than upon any direct precedent. In the month of February, 1878, the owners of the steam-tug *Daring* served a writ on board the steamship *Parlement Belge* against the owners of that vessel and her freight, in which they claimed the sum of 3500*l.* for damage, arising out of a collision which occurred between that vessel and the steam-tug *Daring* on the 14th of February, 1878, off Dover.

The defendants put in no appearance, and took no steps whatever. The plaintiffs have proceeded by default, and taken the usual and proper course, and the case being on the 25th of January

(1) The counsel for the plaintiffs objected to the Solicitor General being heard in reply, on the ground that the Crown was not a party to the suit, but the objection was overruled by the Court.

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in this year ripe for judgment, the plaintiffs gave notice on the 4th of February that the Court would be moved to direct judgment with costs to be entered for them in respect of the damages so claimed, and that the usual order of reference to the registrar and merchants might be made, and that a warrant should issue, the action being in rem, against the steamship *Parlement Belge.*

Having looked at the papers and pleadings, I perceived that the arrest of the ship and the judgment which were prayed, might affect the prerogative of the Crown and its relations with a foreign state; I therefore directed that notice should be given to the law officers, in order that they might have an opportunity, if they thought fit, of shewing cause against the prayer of the plaintiffs.

The Attorney General has appeared and filed what is called an "information and protest," the material part of which I will now read. [His Lordship here read the first six paragraphs of the information and protest.] I have had the advantage of an argument from the Solicitor General on the whole case. The protest of the Attorney General raises a question of constitutional law and a question of international law, both of great moment, and which I will endeavour to consider separately.

By this protest it is in substance contended that this steamship *Parlement Belge* is not amenable to the process of this Court, first, on the ground that she is the property of the King of the Belgians, and at the time of the collision was controlled and employed by him. Secondly, that her Majesty the Queen, by a convention with the King of the Belgians, has placed this packet-boat in the category of a public ship of war. I will endeavour to deal with these questions in the order in which I have stated them, though perhaps they cannot be kept quite distinct.

It is expedient to make a preliminary observation, which is important in its bearing upon one, if not both, of the questions.

The collision in this case took place in Dover Bay, that is, within the body of a county, and therefore previously to the year 1840, this Court would have had no jurisdiction in the matter; but by the joint operation of the statutes 3 & 4 Vict. c. 65 and 24 Vict. c. 10, this Court was given a jurisdiction both in rem and in personam in cases where the collision happened in the body of a county as well as when upon the high seas.

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It follows, therefore, that the plaintiffs in this suit have a statutable right of action against the *Parlement Belge*, unless that vessel be of that privileged class which is not amenable to a court of law.

The burden of proving that she does belong to this class lies upon the defendant [—at present upon the Attorney General—] more especially as it appears from the papers before me that she was engaged in carrying on commerce, howsoever limited in its nature, at the time of this collision.

I turn now to the consideration of the first question raised in the protest. I had occasion to consider most, if not all, of the authorities upon this point in the case of *The Charkieh*. (1) I desire to state at once that in my opinion every public ship of war belonging to a state in amity with her Majesty is exempt from the jurisdiction of this Court. This proposition I maintained in the recent case of *The Constitution* (2); it has been laid down in a variety of cases adjudicated both in our Courts and in those of the United States of North America (which will be found collected in *The Charkieh* (1), and in the case of *Briggs* v. *The Light Boats* (3), decided in the Supreme Court of Massachusetts); and it may be considered, notwithstanding certain dicta in the case of *The Prins Frederik* (4), to be firmly rooted in the jurisprudence of both these countries.

It has been also contended on the part of the Crown, not that the *Parlement Belge* is a ship of war, in the general international sense of that word, but that she is privileged as a mail-packet, the property of the Crown of Belgium, carrying the royal pennon, and officered by commissioned officers of the Royal Belgian navy. On the other hand, it must be taken that she is not a public-armed ship constituting a part of the military force of her nation, nor is she a vessel, so to speak, of pleasure belonging to the Crown, and on that ground perhaps by the comity of nations in the class of privileged ships. In the case of *The Charkieh* (1) I said:—

I am not prepared to deny that the private vessel (for instance, the yacht of the Sultan), though equipped for pleasure and not for war, would be entitled by

(1) Law Rep. 4 A. & E. 59.
(2) Ante, p. 39.
(3) 11 Allen, Mass. Reps. 157.
(4) 2 Dods. 451, 464.

international comity operating (at least, so long as it is not withdrawn by the state conceding it), as international law to the same immunity as a ship of war, though dicta to the contrary may be found in the writings of some jurists.

Since that time I have not found reason to alter the opinion I then expressed. The especial duty of the *Parlement Belge* (to borrow the terms of the treaty to which I will presently advert) is the conveyance of the mails. But though such be the especial duty of the packet, it is by no means its sole occupation. Mr. Gregory has made an affidavit in the following words:—

1. That I did on the 8th day of February, 1879, attend at the office of the Continental Daily Parcels Express, to make inquiries as to the conveyance of goods and merchandize from London to Belgium, viâ Dover and Ostend, by the mailboats, and in reply to my inquiries I was handed the exhibit marked with the letter A, hereunto annexed.

The exhibit referred to is a sort of time and charge table relative to the conveyance by the government mail packets viâ Dover, Ostend, and Calais, of samples of every description, papers, plans, books, articles for private use, luggage, and packages of all kinds up to 200lbs. weight between England and the Continent, viz., France, Belgium, &c.

[His Lordship proceeded to read the second and third paragraphs of Mr. Gregory's affidavit as above set out, and proceeded:—]

The *Parlement Belge*, it would appear, is neither a public ship of war nor a private vessel of pleasure belonging to the Crown of Belgium, nor is she a public ship sent by the government on an exploring expedition, like those ships employed in the Arctic expeditions, all of which ships belonging to England, were, it should be observed, regularly commissioned as ships of war, as I am informed by the Admiralty, with the exception of the *Lady Franklin* and *Sophia*, hired in 1850–51, by the Admiralty and commanded by Captains Penny and Stewart, who were not naval officers. These two vessels were not considered to be entitled to the privileges of ships of war, nor, of course, were the various private vessels fitted out from time to time for exploring the Arctic regions. The *Parlement Belge* is a packet conveying certain mails and carrying on a considerable commerce, officered, as I have said, by Belgian officers and flying the Belgian pennon.

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Can such a vessel so employed be entitled to the privileges of a public ship of war? The analogy between the immunity of the ambassador and the ship of war is obvious. It has been holden by high authorities, both in this and other countries, that an ambassador may lose his privileges by engaging in commerce. Indeed, Lord Campbell was of opinion that in "such a case all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment:" *The Magdalena Steam Navigation Co.* v. *Martin* (1), cited in *The Charkieh.* (2) "A distinction," says Mr. Justice Story, ". . . . has been often taken by writers on public law as to the exemption of certain things from all private claims—as, for example, things devoted to sacred, religious, and public purposes, things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war held by the sovereign jure coronæ, and not be applicable to the common property of the sovereign of a commercial character or engaged in the common business of commerce": *The United States* v. *Wilder* (3); *The Charkieh.* (2) In *The Santissima Trinidad* (4), a case of prize, Judge Story said:—

> The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded on public convenience and policy, and cannot be broken in upon without endangering the peace and repose as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government (at page 336).

Looking to the character of the suit and to other passages in the judgment, it seems to me clear that by the expression "public ship of the government" was meant a ship of war, and not any vessel employed by the government. But even if the term could be treated as more comprehensive and as including public ships such as I have referred to sent by the government on exploring expeditions, it would not include a vessel engaged in commerce,

(1) 2 E. & E. 94, 114; 28 L. J. (Q.B.) 310.

(2) Law Rep. 4 A. & E. 59.

(3) 3 Sumner, 315.

(4) 7 Wheat. 283.

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whose owner is (to use the expression of Bynkershoek, *De Leg. Mercatore*) "strenuè mercatorem agens." (1)

Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the *Parlement Belge* as belonging to that category of public vessels which are exempt from process of law and all private claims.

I now approach the consideration of the second question, viz., whether the convention between her Majesty and the King of the Belgians, ratified on the 24th of March, 1876, does, so far as this country is concerned, place the *Parlement Belge*, while in British ports, in the category of a public ship of war and exempt her from the process of an English Court.

I may observe in passing that the very fact, that this packet is in terms given by the convention the privileges of a ship of war in British ports and there only, tends to shew that she had not such privileges by general international law, and that a convention was deemed necessary to confer them.

It is admitted that this convention has not been confirmed by any statute; but it has been contended on the part of the Crown both that it was competent to her Majesty to make this convention, and also to put its provisions into operation without the confirmation of them by Parliament. The plaintiffs admit the former, but deny the latter of these propositions.

The power of the Crown to make treaties with foreign states is indisputable. Passing by other authorities, I will cite the language of Blackstone, who was not disinclined to maintain the prerogative of the Crown. He says:—

> It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes, for it is by the law of nations essential to the goodness of a league that it be made by the sovereign power; and then it is binding upon the whole community; and in England the sovereign power, quoad hoc, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution, as was hinted before, hath here interposed a check, by the means of Parliamentary impeachment, for the punishment of such ministers as from

(1) Corn. van. Bynkershoek, De Fero Legatorum, ch. xiv. (De Legato Mercatore) p. 165 (ed. 1767).

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criminal motives advise, or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation: Blackstone's Commentaries, vol. 1, p. 256 (ed. 1844), c. 7, s. 2.

The learned writer, however, was certainly aware that this general proposition must receive some modification and restraint besides that which he has mentioned. Blackstone must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, which could be cited is the Declaration of Paris in 1856, by which the Crown in the exercise of its prerogative deprived this country of belligerent rights, which very high authorities in the state and in the law had considered to be of vital importance to it. But this declaration did not affect the private rights of the subject; and the question before me is whether this treaty does affect private rights, and therefore required the sanction of the legislature.

The authority of Chancellor Kent was relied on. That learned writer observes:—

> Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an Act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. Kent's Comm. vol. i. p. 166 (ed. 1873).

And he further observes:—

> There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty.

He then refers to the case of *The United States* v. *The Schooner Peggy* (1) decided by the Supreme Court of the United States. That was a case of prize capture in which the vessel had been condemned, but subsequently a treaty had been made between France and the United States by the terms of which the prize was, among others, restored to its original owner. The Court of Appeal in that case held the treaty to be binding upon it, and indeed said ". . . . that where a treaty is the law of the land, and as such affects the rights of parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as

(1) 1 Cranch, 103.

an Act of Congress. . . ." (1) But the sentence in that case was founded upon the powers of the President, with the consent of the Senate, to make a treaty affecting the rights of a captor, in time of war, and the judgment was given upon that point. The Court said: "It is true that in mere private cases between individuals a Court will, and ought to, struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the Court, but for the government to consider whether it be a case proper for compensation," The whole sentence is founded upon the right of the American executive with respect to prize of war.

The like question arose in England in the famous case of *The Elsebe* (2), in which Lord Stowell said:—

> Prize is altogether a creature of the Crown. No man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace.

Lord Chancellor Brougham, in the case of the booty captured by the army of the Deccan (3), referred to *The Elsebe* (4) as undoubted law, observing that it was therein determined that when the Crown saw "fit to restore the capture, the captors, who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port and the further costs of proceedings in the Admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy. Lord Brougham says in the same judgment:—

> The title of a party claiming prize must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been

(1) At p. 110.
(2) 5 Rob. 173.
(3) Nom. *Alexander* v. *The Duke of Wellington*; 2 Russ. & My. 54.
(4) 5 Rob. 174.

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signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the Crown was minded to part with the property finally and irrevocably—whether even in that case the same paramount and transcendant power of the Crown might not enure to the effect of preserving to his Majesty the right of modifying, or altogether revoking, the grant is a question which has never yet arisen, and which when it does arise will be found never to have been determined in the negative. But this, at all events, is clear, that when the Crown, by an act of grace and bounty, parts, for certain purposes, and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the Crown as it was before the act was done.

The judgment in the case of *The United States* v. *The Schooner Peggy* (1) does not establish the proposition that the Crown can dispose of the rights of a subject without the sanction of parliament. A treaty may contain provisions which are ultrà vires of the prerogative, in part valid and operative, and in part invalid and inoperative. A treaty is, indeed, not necessarily void by reason of the infraction of some of its conditions though it may be voidable; and the validity of it cannot be challenged, speaking generally, by any private person; but a court of justice when called upon to execute the provisions of a treaty may, at the instance of the subject, who is affected by them, examine whether those provisions are such as to be capable of legal enforcement, just as it may inquire into the validity of letters patent granted by the Crown: *Long* v. *Bishop of Capetown* (2); and also into the validity of an order in council, duly passed and gazetted: *Attorney General* v. *Bishop of Manchester*. (3) There have been, not to go further back, during the reign of her present Majesty, various treaties confirmed by parliament; and by statute power has been given to the Crown by order in council to do certain things which it must be presumed without such power it could not have done,—for instance, the Merchant Shipping Act, 1862 (25 & 26 Vict, c. 63), empowers the Crown by order in council to make rules and regulations respecting collisions and salvage services to be binding on the ships of foreign states; the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), relating to a convention between France and England as to sea fisheries, and reciting (in s. 66) that doubts had arisen whether part of the convention between the United Kingdom and France of the 26th

(1) 1 Cranch, 103. (2) 1 Moo. P. C. (N.S.) 411.
(3) Law Rep. 3 Eq. 436.

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of January, 1826, relating to exemption from dues had been confirmed by parliament, proceeded to give such confirmation; and to provide that where any similar convention should thereafter be concluded with any foreign country her Majesty should have power by Order in Council to confer exemption from dues on sea fishing vessels belonging to such foreign country; the 35 & 36 Vict. c. 45, A.D. 1872, confirms the treaty of Washington between the United States and England, and as will presently be seen the very treaty of which this Belgian treaty is a sequel was confirmed by statute. Some of the treaties confirmed relate to the payment of and exemption from dues in harbours; one more, and not an insignificent one, will presently be added. I mention them merely as illustrative of the position that certain treaties do require Parliamentary confirmation. I now turn to the provisions of the treaty which have been relied upon in this case. In the preamble it is said that — [His Lordship here read the preamble of the treaty in question.] The treaty of Berne referred to, and to which this Belgium treaty of 1876 is to form a sequel, being concluded in the year 1874 was specially confirmed by a statute passed in 1875, 38 & 39 Vict. c. 22, the preamble of which is as follows:—

> Whereas under the Post Office Duties Acts, 1840 to 1871, divers powers are given to the Treasury of fixing by warrant the rates of British, foreign, and colonial postage.
>
> And whereas by a treaty made at Berne, on the 9th day of October, 1874, and detailed regulations made under it, various stipulations, and regulations have been made with respect to the duties of postage and other matters connected with the exchange by post with foreign countries, of letters, post-cards, books, newspapers, and other printed papers, patterns of merchandise, and legal and commercial documents.

It goes on as follows:—

> And whereas such treaty and regulations cannot be carried into effect except by the authority of Parliament, and it is expedient to give such authority and to comprise in one Act the powers of the Treasury in relation to fixing the rates of postage: Be it therefore enacted, &c.

The statute then proceeds to enact a variety of provisions relating to the duties on postage, and the post office, and provides by sect. 2 for future arrangements with foreign countries with respect to the conveyance of postal packets, and payments by the Treasury.

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This clause may perhaps suffice to render legally operative the clauses in the subsequent Belgian treaty relating to these particular matters. I find in that treaty a variety of enactments relating to the conveyance of mails between Great Britain and Belgium. By the 10th Article it is provided that—

[His Lordship here read the 10th Article of the treaty in question.]

It is the 6th Article however, which has the most important bearing on this case, and which has been chiefly discussed at the Bar. It is as follows:

[His Lordship read the 6th Article of the treaty.]

With respect to the interpretation of the last clause of this article, it was agreed by counsel, and I am of the same opinion, that the words seizure, detention, embargo, or arrêt de prince, related to the belligerent rights of the Crown, including the droit d'angarie.

With respect to the other clauses of the article, I think it cannot be denied that they purport and intend to place this Belgium packet in the category of a ship of war while in a British port. It is remarkable that this privilege is not, by the words of the article, extended to these packets in territorial waters, nor so far as even British ships are concerned, to the high seas, and does not give them when on the high seas an immunity from actions for salvage and collision happening out of a port. Of course the treaty cannot constitute these packets ships of war in their relation to foreign states.

If the Crown had power without the authority of parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished.

This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown without the authority of parliament, may by process of diplomacy shelter a foreigner from the

action of one of her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors.

Let me say one word more in conclusion. Mr. Bowen, in his very able speech, dwelt forcibly upon the wrong which would be done to this packet if, being invited to enter the ports of this country with the privileges of a ship of war, she should find them denied to her. I acknowledge the hardship, but the remedy, in my opinion, is not to be found in depriving the British subject without his consent, direct or implied, of his right of action against a wrong-doer, but by the agency of diplomacy, and proper measures of compensation and arrangement, between the Governments of Great Britain and Belgium. I must allow the warrant of arrest to issue.

With regard to the rest of the motion, I give judgment in the terms of the notice of motion for the costs of the action other than the costs incident to the present motion, and for a reference to the registrar and merchants.

Solicitors for plaintiffs: *Lowless & Co.*
Agents for Treasury Solicitor: *Hare & Fell.*

1879
June 25.

[IN THE COURT OF APPEAL.]

[APPEAL FROM THE ADMIRALTY DIVISION.]

THE SHIP CONSTANTINE. (1876 O. 474.)

OWNERS OF THE ALICE *v.* OWNERS OF THE CONSTANTINE.

Practice—Security for Costs of Appeal.

An appellant who is clearly liable to give security for costs ought to offer security without an application to the Court, and the offer, if reasonable, ought to be accepted; and in the case of an application to the Court the Court in dealing with the costs will consider whose conduct has made it necessary.

In this case the Admiralty Judge had decided that a sum of money paid into court by the owners of the *Constantine*, as damages for injuries sustained by the ship *Alice*, belonged to and ought to be paid to Bailey & Leetham, and not to the other claimant, J. J. Wallace. Wallace appealed.

Webster, Q.C., for the respondents, applied for security for costs of the appeal, on the grounds that Wallace had been a bankrupt and was now a liquidating debtor, and that part of the money was claimed by him on behalf of the underwriters and not for his own benefit.

Dr. Phillimore, for the appellant.

The Court (Jessel, M.R., and Baggallay and Thesiger, L.JJ.) ordered 20*l.* to be paid into court by way of security, and stated that, in order to prevent the expense of unnecessary applications to the Court for security, it was to be understood that, where the liability to give security was clear, security when asked for ought to be offered without an application to the Court, and the offer, if reasonable, accepted; and that the Court in dealing with the costs of these applications would consider which of the parties had made the application to the Court necessary.

Solicitors: *T. Cooper & Co.; Pritchard & Sons.*

[IN THE COURT OF APPEAL.]

1879
March 22.

CHAPMAN *v.* THE ROYAL NETHERLANDS STEAM NAVIGATION COMPANY. (1876 C. 381.)

Ship—Collision—Limitation of Liability of Shipowner—Mode of ascertaining Amount when both Ships to blame—Merchant Shipping Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Claim of Owners of Cargo and Crew—Priority.*

In an action of collision in the Admiralty Division, where both ships have been injured and both ships have been held to blame, and have accordingly been condemned to pay the moiety of each other's damage, and either of the parties to the collision has applied to have his liability limited under the Merchant Shipping Act, 1862, s. 54, no set-off is allowed between the two amounts for which they are liable in damages, until the limitation of liability imposed by that statute has been applied.

The *S.* and *V.* came into collision, both ships were damaged, but the *V.* was sunk, with her cargo, and lost. In an action by the owners of the *V.*, and counter-claim by the owners of the *S.*, both ships were held to blame and condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the *S.* was 14,000*l.*, and that payable by the *V.* was 2000*l.* The owners of the *S.* then brought an action in the Chancery Division for limitation of their liability, and paid into court 5212*l.*, the aggregate amount of 8*l.* a ton on her registered tonnage:—

Held (Brett, L.J., dissenting), that the owners of the *V.* must prove for 14,000*l.* against the fund in court, and must pay the 2000*l.* in full to the owners of the *S.*

The judgment of Jessel, M.R., on this point reversed:—

Held, also, by Jessel, M.R., that the owners of the *V.* and the owners of the cargo, or the underwriters in their place, and the master and crew of the same ship, must prove pari passu against the fund in court in respect of the moiety of their respective losses.

THIS action was brought by the owners of the steamship *Savernake* to limit their liability in respect of the damage arising out of a collision between the steamships *Savernake* and *Vesuvius* on the 7th of April, 1876, in consequence of which the *Vesuvius* was totally lost with the whole of her cargo.

The defendants, the Royal Netherlands Steam Navigation Company, were the owners of the *Vesuvius*, and the other defendants, Messrs. Van Stolk, were the owners of a portion of her cargo.

The parties agreed upon a special statement for the opinion of the Court, in which the following facts were stated:—

On the 22nd of April, 1876, the defendants, the Royal Netherlands Company commenced an action in the Probate, Divorce, and

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Admiralty Division against the present plaintiffs and the ship *Savernake* for damages to the *Vesuvius* by reason of the said collision.

The present plaintiffs defended the action, and put in a counter-claim against the owners of the *Vesuvius* in respect of damage sustained by the *Savernake* in the collision.

The action was tried on the 24th of July, 1876, before Sir R. Phillimore, the Judge of the Court of Admiralty, when judgment was pronounced deciding that the collision was occasioned by the fault of the master and crew of the *Savernake*, and also of the master and crew of the *Vesuvius*, and that the damage arising therefrom ought to be borne equally by the owners of the two ships; and by the said judgment the owners of the *Savernake* were condemned in a moiety of the claim of the owners of the *Vesuvius*, and the owners of the *Vesuvius* were condemned in a moiety of the counter-claim of the owners of the *Savernake* in respect of their damages; and the damages were referred to the Registrar of the Admiralty Division to assess the amount thereof, and no order was made as to costs.

The present action was commenced in November, 1876, in the Chancery Division by the owners of the *Savernake*, who claimed a declaration that the plaintiffs were not answerable in damages, in respect of loss or damage to the *Vesuvius* and her freight and cargo, to an aggregate amount exceeding 8*l.* for each ton of the gross register tonnage of the *Savernake*, without deduction for engine room.

In pursuance of an order of the Master of the Rolls, the plaintiffs, on the 29th of December, 1876, paid into court 5212*l.* 3*s.* 5*d.*, being the amount of the 8*l.* per ton on the tonnage of the *Savernake*, together with interest from the time of the collision.

On the 8th of May, 1877, the Judge of the Court of Admiralty stayed all proceedings in the action in the Admiralty Division; and on the 25th of June, 1877, the usual judgment in actions for limitation was made in the action in the Chancery Division, and certain inquiries were directed as to the persons entitled to claim distributive shares in the fund in court.

The persons claiming to prove against the fund in court were, 1. The Royal Netherlands Company; 2. Messrs. Van Stolk; and

3. The master and crew of the *Vesuvius*, in respect of their clothes and private effects.

The questions for the judgment of the Court were:—

1. Whether the defendants, the Royal Netherlands Company, were entitled to prove against the fund in court, which then amounted to 5238*l.* 4*s.* 7*d.*, for the full amount of the losses and damages sustained by them by reason of the collision—or (if the Court should adopt the judgment of the Admiralty Division) for one moiety only of the said losses and damages—less the moiety of such damages as should be found to be payable by them to the plaintiffs as owners of the *Savernake*, and to be paid pro ratâ with the other claimants out of the fund in court in respect of one or other of the amounts so proved for.

2. Whether, in the event of the damages being calculated according to the latter basis, the losses and damages sustained by the plaintiffs by reason of the collision should be ascertained by the Chief Clerk or in the Admiralty Division before the chief clerk's certificate was made or otherwise.

3. Whether the defendants, Messrs. Van Stolk, and the other owners of the cargo of the *Vesuvius*, were entitled to be paid out of the fund in court the full invoice value of the goods belonging to them in priority to the claim of the defendants, the Netherlands Steam Navigation Company, and the master and crew of the *Vesuvius*.

4. Whether the master and crew of the *Vesuvius* were entitled to be paid out of the said fund in court pro ratâ with the other claimants.

5. Whether the underwriters of the cargo of the *Vesuvius* who may have paid for a total loss of the goods insured by them were entitled to prove in their own names, and themselves to receive out of court the amount of the fund which might be apportioned in respect of the goods insured by them.

The whole loss sustained by the owners of the *Vesuvius* was taken to be 28,000*l.*; and the total loss sustained by the owner of the *Savernake* was taken to be 4000*l.* No question arose as to the limitation of liability of the owners of the *Vesuvius*, as the sum of 4000*l.* was far below 8*l.* on each ton as her registered tonnage.

The first question was argued first.

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Davey, Q C., Webster, Q.C., and *E. C. Clarkson*, for the plaintiffs, the owners of the *Savernake*, contended that there ought to be no set-off between the amounts for which the owners of the two ships were liable, until the total liability of the *Savernake* as limited by the Merchant Shipping Act, 1862, s. 54, had been ascertained. Therefore the owners of the *Vesuvius* must first pay into court 2000*l.*, being the moiety of damage due from them, and then prove against the fund in court, 5238*l.* 4*s.* 7*d.*, for the difference, which would leave them 3238*l.* 4*s.* 7*d.*

Holl, Q.C., and *Phillimore*, for the owners of the *Vesuvius*, contended that the *Vesuvius* being adjudged to pay 2000*l.*, and the *Savernake* 14,000*l.*, the balance of that amount, 12,000*l.*, was the amount in respect of which the owners of the *Vesuvius* were entitled to prove against the fund in court, which would give them the whole of the fund.

Chitty, Q.C., and *Stubbs*, for the owners of the cargo of the *Vesuvius*.

JESSEL, M.R. I will first of all give my view of what the meaning of the thing is, and then I will see how far that view is consistent with the well-known forms and precedents.

When two ships come into collision, and both are in fault, one or the other can recover damages, and only one of the two, because the result of the action is that either the plaintiff or the defendant is to win something. That is the meaning of it. The consequence of the collision is that damage being done to one or both vessels, the owners of one vessel can recover something from the other. The Admiralty rule in such a case is to take the amount of damage done to each vessel, to add them together, and to halve the amount, so that each owner is inter se to bear half, and then to ascertain who is to pay to the other, and the monition finally issues for the balance. That is all that is ever recovered in the action. That is the substance of it. The one party who wins, recovers from the other party who loses, damages by reason of the collision. The mode of arriving at the amount of damages is what I have stated; by reason of our very curious procedure and very curious rules of law, it is an odd mode, but the substance is, in my opinion, what I have stated.

Now, let us look at what the Merchant Shipping Act, 1862, s. 54, provides: "Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or both, they are not to be answerable in damages" beyond a certain amount. What, then, were they answerable for before the Judicature Act passed? They were answerable for the balance. The other side could not have got from the Admiralty Judge a monition for more than the balance. Although the form of the judgment states the rule in the way I have mentioned, when you come to examine it in fact it resulted in an order for the balance and nothing more. Since the Judicature Act is there any distinction?

If there is, it is entirely in favour of the same view, because, since the Judicature Act, these things are no longer raised by cross-causes, but by counter-claim. There is really only one judgment. What is to be done on that judgment? What is the duty of the judge? I think it is as plain as plain can be that that which was formerly called set-off is now a matter of right and duty, a right in the first party to pay, and a duty in the judge to grant.

I think that is perfectly clear when you look at the Act of Parliament which is for the purpose of enabling the Court to do complete justice. Is it complete justice to make one side pay and leave the other side without paying? The 24th section of the Judicature Act, 1873, sub-s. 3, says: "The said Courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner, as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." Nothing can be wider. The same "relief" shews clearly it may be in diminution of the plaintiff's claim, it may be in excess of the plaintiff's claim, but, though it is no longer to be a cross action, the judge is to do complete justice between the parties.

Then the 3rd rule of Order XIX. says: "A defendant in an

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action may set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." And Order XXII., rule 10, says: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

Now, I am asked to make that word "relief" mean where he wins altogether. I decline to accept any such interpretation. It may be in diminution of the plaintiff's claim, as it is in the 3rd sub-section of the 24th section of the Act of 1873. The result, therefore, is this, that where it says, "The Court may adjudge what the defendant is entitled to," it means, "the Court shall," and consequently where the question in the action is, who is to pay damages on account of the collision, the Court is bound to see who is to pay on the balance and to order for it. Therefore, the result under the Judicature Act is the same as the practical result was before the Judicature Act, by reason of the judge only issuing the monition for the balance. The total result, therefore, is this, that the mode of calculating the damages is what I have stated, but the damages are calculated as the damages arising from the collision, payable by one party to the other, which is the balance in case both vessels are damaged. Of course in the case of one vessel being damaged only, there is only one payment in respect of that one vessel.

That, I think, is the fair view of the Act of Parliament, not two losses, not two separate, independent actions, and two separate independent rights, but the loss arising from the collision; and if you look at the Act of Parliament you will find that there is nothing said about the person entitled to recover. It is only a limitation of the amount that the owner of the vessel is liable to pay. It appears to me a fallacy to say that the owner of that vessel is entitled to recover from the owner of the other; on the

contrary, he is liable to pay the balance (that is the substance of the case), and not entitled to recover.

Although it is true that you may have, by reason of some defective procedure, or some difficulty in reaching the owner of the other vessel, a difficulty in making your demand effectual, it appears to me that is the substance of the matter, and all the rest is mere form. That being so, I am of opinion that as between the owners of the two vessels the amount payable as damages to the owners of the *Savernake* is the difference or balance of the two moieties ascertained in the way I have indicated. So far as they are concerned, they have a right to prove, and as I have already said, it does not make the owners of the *Savernake* liable to pay beyond the 8*l.* per ton, nor was it intended that they should pay more.

Now as regards the intention of the legislature, I think that is plain; originally the limit of the shipower's liability was the value of the vessel, but there was inconvenience about that, and instead of that this tonnage value was substituted; the theory being, that when the owner of the vessel (and when I say owner of the vessel I mean owner of the vessel and freight) gave up all he was entitled to, he should not pay more. That is the theory of the legislature, and when you look at it in that light, it is quite clear he is not to be in a position to receive compensation for damage to his vessel, and at the same time not to pay compensation for damage to the vessel of other people; he is not to put money into his own pocket; clearly he is to get no profit, and he is to give up his vessel and freight, and that will be the result according to the decision I have arrived at. It seems to me to be in accordance with the substance of the enactment, and also with the history of the legislation.

July 19. On this day the remaining questions were argued before the Master of the Rolls.

Holl, Q.C., and *Phillimore*, for the owners of the *Vesuvius*.

Chitty, Q.C., and *Stubbs*, for the owners of the cargo, referred to *The Milan*. (1)

JESSEL, M.R. It does not appear to me that there is any question

(1) Lush. 388.

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of priority at all. What I am now dealing with is not that which has been lost through the negligence of the owners, because that is the other half, and, as Dr. Lushington says in *The Milan* (1), "The Admiralty rule as applied to the owner of cargo would appear to rest upon the considerations I have just mentioned, that abstract justice might give a remedy to him against the owner of each vessel in proportion to the culpability of each; but as it is impossible, where both of these are in fault, strictly to apportion the blame, by an equitable though arbitrary rule, or, as it has been called, a judicium rusticorum, the opposing ship is made liable to one half only of the damage, and the innocent owner of cargo is left, as to the other half, to sue the owner of the ship on board which his goods were carried. I do not see injustice in this arrangement: on the contrary its purpose is equity."

It appears to me that decides both questions. First of all, what can the owner of the one ship claim against the other ship? he can only claim half the damage (in this case there is no question as to the damage), therefore he can, as against the owners of the other ship, in no case get more than half the damages, and if he can never get more, he cannot prove for more, because it is impossible to allow a man to prove for a larger sum than he is entitled to be paid. The dividend in that case might be considerably more than 10*s.* in the pound, and he cannot get more than he is entitled to. Instead of valuing the other ship, and paying in the value of ship and freight, we have an arbitrary tonnage rate fixed to represent the value of the ship for this purpose, and it appears to me plain that his proof cannot exceed that.

The next question is the question of priority as between him and other claimants. There is no priority claimed against other owners of cargo, but it is said, as between owners of cargo and owners of ship, that the owners of cargo should get a priority or preference as against the other ship. Why? This is a sum divisible between the owners of ship and the owners of cargo, because, as regards this sum, it is the ship the proceeds of which I am dealing with (or the sum paid in lieu of proceeds) which was to blame. It is on account of the negligence of that ship that this sum is recovered. It is not a sum which is lost by

(1) Lush. at p. 401.

reason of any negligence on the part of the shipowner, that is the other half, and as to that, the owners of the cargo will have a right of action against the shipowner, a right of action which I do not interfere with, but that right of action does not give them any lien as far as I know, or at least it does not exist by common law or statute against the other shipowner.

It appears to me, therefore, that as far as this fund is concerned there is no priority.

The order made by the Master of the Rolls was as follows:—

This Court doth declare that the defendants the Royal Netherlands Steam Navigation Company are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steamship *Savernake*, and to be paid in respect of such balance pari passu with the other claimants out of the fund in court; and doth declare that the defendants the owners of the cargo of the *Vesuvius* are entitled to prove in respect of a moiety only of the value of their goods and merchandise and pari passu with the defendants the Royal Netherlands Steam Navigation Company, and the master and crew of the *Vesuvius*; and doth declare that the underwriters may prove in their own names and receive out of Court the amount of the fund apportioned in respect of the goods insured by them on their proving that they have paid for a total loss. And it is ordered that the inquiries directed by the judgment of the 25th of June, 1877, stand over till the loss and damages have been assessed in the Admiralty Division, and that the Plaintiffs pay the costs of the questions.

From this judgment, so far as it related to the answer to the first question as to the amount for which the Royal Netherlands Company were entitled to prove, the plaintiffs appealed.

The appeal was heard on the 6th of November, 1878.

Davey, Q.C., Webster, Q.C., and *Clarkson,* for the plaintiffs. There is no right of set-off in such a case as this. The judgment of the Admiralty Court condemns each party in the whole amount to which they are liable to pay to the other. Before the Judicature Act there would have been a separate action and a separate judgment in each case: *The North American.* (1) It is true that where both ships were found to be in fault, a monition issued out of the Admiralty Registry to pay the balance, but the monition was not the judgment, but a process to enforce it. The principal and cross cause were quite independent, and the evidence in one was not admissible in the other without special leave, and all

(1) Swab. 466; Lush. 79.

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the pleadings and procedure were distinct: Pritchard's Digest (1); *The Singapore.* (2) The practice was intended merely to prevent circuity of action. If instead of bringing a cross cause the defendant had lain by and brought a cause of damage afterwards for the damage to his ship, he would have been entitled to judgment, although his conduct for so doing might have been visited with costs: *The Milan* (3); *The Aurora* (4); *The Calypso.* (5) This was the practice to which the limitation of liability under 25 & 26 Vict. c. 63, s. 54, had to be applied. The object of the Act was to create a fund out of which all parties having a claim for damages against the defendant's ship should be paid proportionally. It was not intended to alter the rights of the defendants against the plaintiffs. Nor has any alteration been made by the Judicature Act. Each judgment still has its full effect, although they are combined in one final judgment: *Wahlberg* v. *Young.* (6) It was still in the power of the defendants if they had pleased to bring a separate action instead of claiming damages by counter-claim. If the contention of the defendants is to prevail, the owners of the *Savernake* will have to pay exactly the same damages to the *Vesuvius* as if the *Savernake* had been alone to blame, which cannot be just, and would, in fact, be overruling the judgment of the Admiralty Judge of the Court of Admiralty.

Holl, Q.C., and *Phillimore*, for the defendants, the owners of the *Vesuvius*. Before the passing of the Judicature Act, when both ships were liable for damages the monition was for payment of the balance. It is erroneous to say that the practice was introduced merely to avoid circuity of action. It was based upon the rule that where there was joint default and joint loss, the damages must be apportioned between them. In fact, the damages were thrown into hotchpot, and divided between the parties. The damages of one were never assessed independently of the other. It was on the same principle as the mutual credit clauses in the Bankruptcy Acts. If it appeared that both ships were in fault, and the defendant did not bring in his cross claim, the judge would not compel the money found due in the original action to

(1) Page 591.
(2) Law Rep. 1 P. C. 378.
(3) Lush. 388.
(4) Lush. 327.
(5) Swab. 28.
(6) 45 L. J. (C.P.) 783.

be brought into court till the defendant had made his claim. The whole matter was one of broad principle to apportion the damages between the two ships, and was treated as one question, although technically there were two suits. The monition was the final judgment; it was the judicial act determining the rights of the parties. The monition for payment by one party would not be issued without payment by the other. The limitation of liability introduced by the Merchant Shipping Act could not take effect till after their mutual liabilities were assessed and the balance ascertained. The ship which has to pay the balance does not need the protection of the Act, except for the balance payable by her. *The Woodrop Sims* (1); *De Vaux* v. *Salvador* (2); *Hay* v. *Le Neave* (3); *The Seringapatam.* (4) Under the Judicature Act, in all cases where the parties proceed by claim and counter-claim the judgment is only for the balance: Order XXII., rule 10; *Staples* v. *Young.* (5) Therefore, whatever doubt there may have been under the old practice, the defendants are clearly entitled under the present practice to prove against the fund for the whole of the balance.

Chitty, Q.C., and *Stubbs*, for the owners of the cargo of the *Vesuvius*.

Davey, Q.C., in reply.

Cur. adv. vult.

1879. March 22. BAGGALLAY, L.J. The question involved in this appeal has arisen under the following circumstances:—

On the 7th of April, 1876, a collision took place between the steamship *Savernake*, belonging to the plaintiffs, and the steamship *Vesuvius*, belonging to the defendants, the Royal Netherlands Steam Navigation Company.

On the 22nd of the same month an action for damages was commenced in the Admiralty Division by the owners of the *Vesuvius* against the *Savernake* and her owners; the owners of the *Savernake* defended the action, and put in a counter-claim against the owners of the *Vesuvius*.

The action was tried on the 24th of July, 1876, before the Judge of the Admiralty Division, who held both vessels to blame,

(1) 2 Dods. Adm. Rep. 83.
(2) 4 Ad. & E. 420.
(3) 2 Shaw's Sc. App. 395, at p. 403.
(4) 3 Wm. Rob. Adm. Rep. 38.
(5) 2 Ex. D. 324.

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and condemned the owners of each in a moiety of the losses and damage sustained by the other, and it was referred to the Registrar of the Admiralty Division, assisted by merchants, to assess the amount of such damage respectively.

The owners of the *Savernake* thereupon availed themselves of the provisions of the Merchant Shipping Acts, and commenced the present action in the Chancery Division, claiming a declaration that they were not answerable in respect of loss or damage to the *Vesuvius* and her freight, and the goods, effects, and merchandise and other things on board the said ship, to an aggregate amount exceeding the sum of 5064*l.*, being the amount of 8*l.* per ton on the registered tonnage of the *Savernake*, and for relief consequent on such declaration. The defendants in the limitation action are the Netherlands Steam Navigation Company and the owners of a portion of the cargo which was on board the *Vesuvius* at the time of the collision.

By an order of the Master of the Rolls dated the 9th of December, 1876, leave was given to the plaintiffs to pay into court to the credit of the action the sum of 5212*l.* 3*s.* 3*d.*, being the amount of the aforesaid sum of 5064*l.*, together with interest thereon at 4 per cent. per annum from the time of the collision, and on the 29th of December, 1876, the sum of 5212*l.* 3*s.* 5*d.* was paid into court pursuant to such order.

By the same order the defendants, the owners of the *Vesuvius* and the defendants the owners of her cargo, were restrained from further prosecuting the proceedings commenced by them in the Admiralty Division against the owners of the *Savernake* in respect of the collision, until judgment in the present action or further order, without prejudice to the continuation of the proceedings in the said Division in respect of the counter-claim of the *Savernake*.

On the 25th of June, 1877, judgment was given by the Master of the Rolls in the limitation action, and a declaration of limitation of the liability of the owners of the *Savernake*, as claimed by them, was made, and inquiries were directed for the purpose of ascertaining who were the persons entitled to the fund so paid into court and its accumulations, and in what proportions it ought to be distributed amongst the persons who should be found entitled, and the injunction awarded by the order of the 9th of December, 1876,

was continued until further order against the defendants the owners of cargo, and all claimants other than the defendants the Steam Navigation Company.

It would appear that the effect of these proceedings in the present action has been to leave the damages, in which the owners of the two ships have been respectively condemned, to be assessed by the registrar and merchants under the order of the Admiralty Division of the 24th of July, 1876.

In the course of the prosecution of the inquiries so directed by the Master of the Rolls, the defendants the Steam Navigation Company, as owners of the *Vesuvius*, claimed to prove for the full amount of the loss and damage sustained by them by reason of the collision—or in the alternative to prove for one moiety of such losses and damages—less the moiety of such damages as should be found to be payable by them to the plaintiffs in respect of the losses and damages sustained by the plaintiffs, and to be paid pro ratâ with the other claimants out of the fund in court, in respect of the amount for which they should be held entitled to prove.

On the 13th of July, 1878, the claims so asserted by the plaintiffs, together with certain other questions which had arisen in the course of the proceedings, were brought under the consideration of the Master of the Rolls, upon an agreed statement of facts. The first of the alternative claims of the Steam Navigation Company does not appear to have been pressed, at any rate it has not been supported in argument before us, and it is clearly untenable; the second was opposed by the plaintiffs, who insisted that the company ought to prove for a moiety, when ascertained, of the amount of damage sustained by the *Vesuvius*, without deducting a moiety of the amount of damage sustained by the *Savernake*. If this contention of the plaintiffs were to prevail, it would leave them in a position to assert their claim against the owners of the *Vesuvius* for the amount, when ascertained, in which such owners have been condemned in respect of the damage occasioned to the *Savernake* by the improper navigation of the *Vesuvius*.

The Master of the Rolls decided in favour of the second of the alternative claims of the company, and from that decision the present appeal is brought.

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The owners of the *Vesuvius* have not asserted any claim to a limitation of their liability.

The question involved in the appeal is one of considerable importance, not only to the parties interested in the present action, but also as affecting the principle upon which the liabilities of shipowners are to be measured, in cases where both ships are held to blame in respect of a collision, and the owners of one or both claim a limitation of liability under the provisions of the Merchant Shipping Acts.

If the contention of the respondents is well founded, the plaintiffs, as the owners of the *Savernake*, instead of having their liability limited to 8*l.* per ton upon the registered tonnage of the ship, will also lose the amount in which the owners of the *Vesuvius* have been condemned, and will be exactly in the same position as regards the amount of loss they will have to bear as they would have been in had they been held alone to blame, that is to say, they will have to pay the 8*l.* per ton and bear the loss of all the damage done to their own ship. The owners of the *Vesuvius*, on the other hand, by reason of their escaping the payment of the amount in which they have been condemned, by deducting it from the amount in which the owners of the *Savernake* have been condemned, and proving for the balance only, will obtain payment in full of so much of the amount in which the owners of the *Savernake* have been condemned as is equal to the amount in which they have themselves been condemned. The claimants, in respect of cargo, &c., are also benefited by the decision of the Master of the Rolls, inasmuch as the proportionate parts of the fund paid into court to which they are entitled will be increased in amount by a reduction of the proof of the owners of the *Vesuvius*, and we consequently find them siding with the company in opposing the appeal. Now, it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with a true construction of the Merchant Shipping Acts, but if such be their true construction we are bound to adopt and act upon it, however inequitable in our opinion the result may be. The question, therefore, for present consideration is whether the true construction of the Acts is that which the Master of the Rolls has adopted.

With all respect for that learned judge, and for Lord Justice

Brett, who is of opinion that the appeal should be dismissed, I think that the view contended for by the plaintiffs is more in accordance with the true construction of the Merchant Shipping Act, 1862, upon which, as it appears to me, the whole question turns.

The 54th section of that Act, so far as it is applicable to the case we are now considering, may be conveniently stated in the following terms :—" Where, by reason of the improper navigation of any ship, but without the actual fault or privity of its owners, loss or damage is caused to any other ship or to any goods on board such other ship, the owners of such first-mentioned ship shall not be answerable in damages in respect of such loss or damage to an aggregate amount exceeding 8*l.* per ton of their own ship's tonnage."

The aggregate which is so limited to 8*l.* per ton is made up of (1) damages in respect of the loss or damage to the other ship, and (2) damages in respect of the loss, or damages to the goods on board such other ship; but, as regards both classes of damages, they are to be in respect of loss or damage occasioned by the improper navigation of the ship, whose owners claim the benefit of limited liability. What, then, are the damages to which the owners of the *Vesuvius* would be entitled in respect of the loss or damage occasioned to that ship by the improper navigation of the *Savernake*, if no claim to limited liability had been made by the owners of the *Savernake?* It appears to me that the damages to which, upon this hypothesis, the owners of the *Vesuvius* would be entitled would be a moiety of their claim in the Admiralty action, as assessed under the order of the 24th of July, 1876, or under any substituted jurisdiction. It may be, and possibly is, quite true that after the assessment of the amounts in which the owners of the ships were respectively condemned, the Admiralty Division would order the owners of the *Savernake*, which had admittedly sustained less damage than the *Vesuvius*, to pay to the owners of the *Vesuvius* the difference between the amounts of the two assessments; but that would be mere procedure adopted for convenience only, and to avoid the circuitous course of reciprocal payments; the amount of damage occasioned to each ship by the improper navigation of the other could not be altered by the order for pay-

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ment of the balance by the one condemned in the larger amount. And it is in respect of the damage occasioned to one ship by the improper navigation of the other, as such damage would be ascertained independently of the provisions of the Merchant Shipping Acts, that limited liability is given by those Acts, and not in respect of the ultimate balance, which under the procedure of any Court having jurisdiction may be payable on the final winding-up of all matters of account arising out of the collision.

But our attention has been directed in the course of the argument to the practice of the Court, as constituted previously to the passing of the Judicature Acts, of setting off, in cases of collision in which both ships were held to blame, the amounts in which the owners of the ships were respectively condemned, and of issuing a monition for payment of the balance by the owners of the ship condemned in the larger amount, and it has been contended on behalf of the respondents that such balance, being the amount which could have been so ultimately recovered by the owners of the ship that had sustained the greater amount of damage, should be treated as the amount of damages provable by them in a limitation suit.

It is immaterial, in my opinion, to consider the various steps in the proceedings of the Admiralty Court which would have preceded the issuing of a monition for the payment of a balance under such circumstances as have been referred to in argument, though cases have been cited on the subject by the one side and the other. I will assume, for the purpose of the few remaining observations which I have to make, that the practice was as it has been represented by the counsel for the respondents, and as I have endeavoured to concisely describe it. It sufficiently illustrates the nature of the argument founded upon it, though exception may be taken to the form in which it has been presented.

But in what respect did the practice of the Admiralty Court, of issuing a monition for the payment of the balance after the sums which each party was liable to pay to the other had been ascertained, differ in principle from that which might and probably would be adopted by the Admiralty Division under similar circumstances, and to which attention has been directed? Then, as now, convenience dictated the form in which the ultimate order should

be made, but such ultimate order was for the purpose of giving effect to rights previously declared after the pecuniary results of such declaration had been ascertained. It appears to me that under the provisions of the Admiralty Jurisdiction Act, 1861 (24 Vict. c. 10), and the recent Judicature Acts, the Court of Admiralty, previously to the last mentioned Acts coming into operation, and the Admiralty Division from that time, acquired the power of doing directly what the Court of Admiralty previously to the Act of 1861 had done or endeavoured to do indirectly; that is to say, the power, after the amounts in which the owners of each ship were liable to the owners of the other had been ascertained, of securing that the owners of one ship should not receive the amount coming to them, without ample provision being made that they should in return pay or account for the amounts of their own liability, and in no better way can such provision be made than by setting off the one amount against the other, and ordering payment of the balance, and for that purpose and for no other, as it appears to me, have monitions or orders for payment of the balance been from time to time made.

I am of opinion that the order of the Master of the Rolls should be reversed, and that an order should be made, declaring that the owners of the *Vesuvius* ought to prove for the amount of one moiety of the loss or damage sustained by their ship by reason of the improper navigation of the *Savernake*, when such amount shall have been assessed in manner directed by the order made in the Admiralty Division on the 24th of July, 1876; and that the costs should follow the result.

BRETT, L.J. This was an appeal from an order of the Master of the Rolls, dated the 19th of July, 1878, made upon a question of law raised before him, in and by a statement of facts agreed upon by the plaintiffs and the defendants, in an action to limit the liability of the plaintiffs in respect of the losses and damages arising out of a collision between two steamships. The questions, as stated in the case, were—(1.) Whether, under the circumstances set forth, the defendants, the Royal Netherlands Steam Navigation Company, are entitled to prove against the sum of 5238*l.* 4*s.* 7*d.* paid into court, for the full amount of the losses and damages they have

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sustained by reason of the said collision—or for one moiety only of the said losses and damages—less the moiety of such damages as should be found to be payable by them to the plaintiffs as owners of the steamship *Savernake*. (2.) Whether, in the event of the defendants' claim being calculated according to the latter basis, the losses and damages sustained by the plaintiffs by reason of the said collision should not be ascertained by the chief clerk or in the Admiralty Division before the chief clerk's certificate is made or otherwise.

The order of the Master of the Rolls was as follows:—"This Court doth declare that the defendants, the Royal Netherlands Steam Navigation Company, are entitled to prove for one moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steamship *Savernake*, and to be paid in respect of such balance pari passu, &c. And it is ordered that the inquiries directed by the judgment dated the 25th of June, 1877" (the judgment in the limitation action), "do stand over until the loss and damages which the plaintiffs and the defendants the Royal Netherlands Steam Navigation Company have sustained have been assessed in the Admiralty Division."

It is difficult from these statements to ascertain the exact question which we have to determine. That can only be eliminated from a consideration of the facts which have happened and the course of the litigation.

A collision having occurred between the steamship *Savernake*, belonging to the plaintiffs, and the steamship *Vesuvius*, belonging to the defendants, the latter brought an action in the Admiralty Division against the *Savernake*. The owners of the *Savernake*, the present plaintiffs, defended that action, and put in a counter-claim in respect of the damage sustained by the *Savernake* in the collision.

This action was tried in the Admiralty Division, and both vessels were pronounced to be in fault, and the damages were referred to the registrar and merchants. Actions were threatened or were anticipated on behalf of certain owners of cargo on board the *Vesuvius*. Then the owners of the *Savernake* commenced an action in the Chancery Division to limit their liability in respect of all claims to 8*l*. a ton. Under an order made in that action the

owners of the *Savernake* paid into court the sum of 5212*l.* 3*s.* 5*d.*, the aggregate amount of 8*l.* per ton on the proper tonnage of the *Savernake*, with interest, and an inquiry was directed to ascertain the persons entitled to claim upon the said sum, and the manner in which the same should be distributed among the persons found to be entitled. For besides the owners of the *Vesuvius* the owners of the cargo on board her also made claims. In the course of the inquiry thus ordered, a question arose as to the amount in respect of which the owners of the *Vesuvius* would be entitled to prove, for the purpose of obtaining their proportion of the distribution. It was alleged that the damage to the *Vesuvius* amounted to about 28,000*l.*, and the damage to the *Savernake* to about 4000*l.*

The owners of the *Vesuvius* claimed to prove on the following footing: — Damage to *Vesuvius*, 28,000*l.*; owners of *Vesuvius* entitled to be paid in respect of such damage, 14,000*l.* Damage to *Savernake*, 4000*l.*; owners of *Savernake* entitled to be paid, or to deduct in respect of such damage, 2000*l.* Therefore, owners of *Vesuvius*, if there were no limitation, would be entitled to receive 12,000*l.* Therefore they are in the limitation of liability suit entitled to prove for 12,000*l.*

The owners of the *Savernake* contended that the proof should be as follows:—Damage to *Vesuvius*, 28,000*l.*; *Vesuvius*, if there were no limitation, would be entitled to be paid 14,000*l.*; but by reason of the limitation given to the *Savernake* are only entitled to be paid to the extent of 5200*l.*, or, in other words, *Savernake* only liable to pay 5200*l.* Damage to *Savernake*, 4000*l.*; owners of *Savernake* entitled to receive in respect of such damage, 2000*l.* Therefore, if there were no other claimants, the owners of the *Savernake* would have to pay 3200*l.* Therefore in the limitation suit the owners of the *Vesuvius* can only prove for 3200*l.*

The Master of the Rolls decided in favour of the view presented by the owners of the *Vesuvius*, and his order carries out that view. The appeal is against that order. Our decision must depend upon what is the true application to such a case of sect. 54 of the statute 25 & 26 Vict. c. 63 (Merchant Shipping Amendment Act, 1862), by which, omitting inapplicable matter, it is enacted that the owners of any ship shall not, where any loss or damage is by reason of the improper navigation of such ship caused to any other

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ship, "be answerable in damages in respect of loss or damage to ships, goods, merchandise, or other things . . . . to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage." The case to which we have to apply this enactment is that of a collision between two ships, a claim and a counter-claim in the Admiralty Division, a judgment thereon that both vessels were to blame, and a limitation action in the Chancery Division by the owners of the vessel which was the less injured of the two. The same question might have been raised by a petition in the Admiralty for a declaration of limitation of liability. No difficulty in the application of the statute in question can arise, except where both vessels are pronounced to be in fault. At the time of the passing of the Act of 1862 the difficulty therefore could only have arisen in respect of a decision given, or to be given, in a suit in the Admiralty Court. Since the passing of the Judicature Act of 1873, s. 25, sub-s. 9, it may arise in respect of a decision in other Divisions of the High Court. But the Merchant Shipping Amendment Act, 1862, must be interpreted, I think, as it would have been on the day after it came into operation. I therefore, with deference, think it better not to discuss the effect of the procedure under the Judicature Acts. Whatever was the effect of the Merchant Shipping Act, 1862, upon the rights of parties before the Judicature Act must be, in my opinion, its effect now. The Judicature Acts did not alter rights, but only procedure.

In order to interpret the Merchant Shipping Act, 1862, or to apply it, it seems to me necessary to consider what at the time of the passing of the Act the course of procedure in the Admiralty Court in a cause of damage was. In case of a collision a cause was instituted by the owners of one of the ships, a warrant was issued, either the ship proceeded against was seized, or her owners, without waiting for such seizure, entered an appearance upon giving bail to or paying into court the amount for which the cause was instituted. If the ship was seized, bail might be given to the ascertained value of the ship, if that was less than the sum for which the cause was instituted, or to the amount for which the cause was instituted if the value of the ship was greater than that. The cause then proceeded; the owners of the ship proceeded against might or might not institute a cross cause; if they did not, the single cause

proceeded to hearing. If the question of joint blame was raised by proper pleadings in that cause, the Court would in that suit give judgment either that the defendant's ship was solely to blame, or that both ships were to blame; and the Court in and by such judgment, unless the amount was admitted, would refer to the registrar and merchants the amount of damage done to the plaintiff's ship. In the former case the plaintiff would eventually be entitled to recover the whole amount of damage done to his ship, in the latter case the half of such amount. After the report of the Registrar to the Court the plaintiff applied to the Court for "an order for the payment" of the money due to the plaintiff. If the defendant had paid money into court the order was to pay to the plaintiff the amount due out of the fund in court, and upon such "order for payment" the plaintiff obtained a cheque from the registrar. If the defendant and sureties had given bail, the "order for payment" was an order on the defendant and his bail to pay the amount on a particular day. If the amount was not paid on that day the "order for payment" was enforced by "monition" to pay it on a particular day, and on neglect by "attachment." But in general before the Judicature Acts the defendants in a suit instituted in respect of a collision did at some time, sooner or later, institute a cross cause. To the cross cause thus instituted the original plaintiffs sometimes appeared and sometimes did not appear. If they appeared they in their turn gave bail. If they did not appear, and their ship could not be seized, the cross cause could not for the time proceed, yet the Court before 1862 had no power to stay the proceedings in the first cause. This was decided in several cases—as in *The Seringapatam* (1); *The Heart of Oak* (2); *The Carlyle* (3); *The North American.* (4) The first case proceeded to judgment, that is to say, to the judgment which declared the liability, and it further proceeded to the inquiry thereupon by the registrar and merchants. And the Court could not direct an inquiry as to the amount of damage done to the defendant's ship so as to allow the defendant to deduct the half of such amount from the amount due to the plaintiff. That was decided in *The Seringapatam.* (1)

(1) 3 Wm. Rob. Adm. Rep. 41, n.
(2) 29 L. J. (Adm.) 78.
(3) 30 L. T. [O.S.] 278.
(4) Sw. 466.

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The Court, therefore, allowed the inquiry to proceed as to the amount of damage suffered by the plaintiff's ship, and issued "an order for payment" against the defendant and his bail. But the Court by anticipation refused to issue a "monition" to the defendant and his bail, to pay to the plaintiff the loss or damage suffered by the plaintiffs' ship; for, instead of making the "order for payment" an order to pay to the plaintiff, it ordered "the amount to be paid into court under the decree not to be paid out till the plaintiff should consent to a deduction in respect of the damage done to the defendant's ship." Thus, in *The North American* and *The Tecla Carmen* (1), where there was no appearance to the cross-actions, the Court refused to stop the proceedings in the first action, or to refer the damage done to both vessels; but after the report of the registrar on the amount of damage done to the plaintiff's vessel refused to make "an order for payment" to the plaintiff, until decree should be given in the cross-action, and ordered the amount reported due by the registrar to be paid into the registry. It is obvious that the Court of Admiralty was struggling to effect in these cases, as the result of the litigation, that only one payment should, in fact, be made, and that such payment should be a payment of the balance between the amounts of the two damages. But the Court could not interfere until the moment when it was asked to enforce the decree it had been obliged to make, that is to say, until it was called upon to issue a "monition to pay." That it refused to do. The difficulty in proceeding, which the Court so evidently considered to be just, namely, so as to make the suit end in one payment only, and that a payment of the balance, was met by the enactments contained in sect. 34 of the Admiralty Court Act, 1861 (24 Vict. c. 10). "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested on security given by him to recover judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security

(1) Lush. 79.

has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause." The Court after that statute could, if the defendant instituted a cross cause, force the plaintiff to appear to it, and insist that both causes should be heard together. This could be for no other purpose than to arrive directly at the result which had been sought, and which was probably arrived at indirectly, in the cases of *The Seringapatam* (1) and *The North American.* (2) The same result was now procured, whether there was at the commencement of the litigation only one cause or a cause and a cross cause. Before the litigation ended there was a cause and a cross cause. But in such circumstances the two causes, though tried together and upon the same evidence, were distinct and separate causes just as they had been before: *The Calypso.* (3) Each, therefore, proceeded by separate pleadings and resulted in form in separate judgments as to liability. In each there was, if the proceedings were formally drawn out, a judgment or decree which declared that both ships were to blame, and ordered a reference to the registrar and merchants to ascertain the amount of damage suffered in each cause by the plaintiff's ship. Whether the registrar would thereupon in form hold two separate references, I know not. I doubt much whether he ever did. He would, in strictness, I presume, make a report in each case, though I should think he never did. It may even be that "an order for payment" would be made in each suit, though I much doubt it. But it seems to me impossible to suppose that more than one "monition" ever issued. It cannot be that the Court of Admiralty ever issued two "monitions," so as uselessly and ridiculously to force both the parties to pay and receive the moneys awarded to one of them, thereby both paying and receiving an identical sum. There must have been one "monition" only, and that must have been to pay the balance only, upon which monition, if disobeyed, one attachment alone could issue. One party only was made to pay; one party only was, or may well be said to have been, made liable in damages.

(1) 3 W. Rob. 41, n.

(2) Lush. 79.

(3) Sw. 28.

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The question then is how to apply the 54th section of the Merchant Shipping Amendment Act, 1862, to such a procedure. The limitation of liability is applicable as well to cases in which the defendant's ship is solely to blame as to cases in which both ships are to blame. It was therefore, when the statute was passed, applicable to claims enforced by a common law action, as well as to claims enforced in the Admiralty, only that the complication arising from action and cross action in which both ships should be held to blame could only arise in the Admiralty, for upon such a finding in the common law actions neither party would be liable to pay any damages. Again, the limitation might be required either when the only claim against the defendant was by the owner of the other ship, or where there were several persons claiming against him. In the former case, if the action were at common law, the amount of the verdict was, I have no doubt, upon the evidence given, confined to the limitation amount, the verdict being practically the last step in the cause other than mere administrative steps taken as matter of course by the successful party. If the suit were in the Admiralty Court, and the defendant's ship declared solely to blame, there must have been an inquiry by the Court, that is, by the registrar and merchants, as to the amount of damage suffered by the plaintiff's ship; and if that amount was greater than the limitation amount, the "order for payment" must have been confined to such amount. But if in either Court there were several claims in different actions against the defendant, or if several claims were apprehended, the defendant, as against all those actual or apprehended claimants, might proceed in Chancery by a bill, or, after the Admiralty Court Act, 1861, in the Admiralty by a petition for a declaration of the amount of his liability, and for an injunction to stay actions, and for an order as to the distribution of such amount rateably amongst the several claimants. This power was given to the Court of Chancery formerly by the statute 53 Geo. 3, c. 159, sect. 7, afterwards by the Merchant Shipping Act, 1854, pt. ix. sect. 514. It was given to the Court of Admiralty by the Admiralty Court Act, 1861, s. 13. This application by a shipowner was, it must be observed, made in a different action or suit from the collision action or suit, and was made as between the shipowner and parties who

were not parties to any one collision action or suit. The limitation suit, or petition, might be commenced before or after the judgment as to liability in an Admiralty suit, and so far as I can see, if before execution, before or after judgment in a common law action. The claim for a limitation of liability, as against several or aggregate claims, could not be made by any means in any of the suits brought in the Admiralty for compensation by reason of the collision, or in any action at law brought to recover such compensation. And that being so, it seems to me to follow that every such suit or action must, if not stopped by injunction at an earlier stage, have proceeded to judgment as if no statute limiting the liability existed. How, then, could the statute affect such suit or action if allowed to proceed? Only after judgment and before execution. Suppose, then, a cause in the Admiralty by the one shipowner against the other, and a cross cause, and judgment in each declaring that both ships were to blame, and ordering inquiry as to the amount of damage suffered by the ship proceeded against. And suppose such inquiry or inquiries held, and report or reports made as to the amount of damage suffered by each ship. If there were no Limitation of Liability Act the one party would obtain an "order for payment" of the balance, and the other party would obtain no order for payment, or at the most one party alone would obtain a "monition," and that would be a monition to pay the balance. But, then, suppose other claims are made or apprehended against him who would have to pay such balance, and he thereupon in a suit instituted by him, or in a petition presented by him, claims a declaration of limitation of liability. He must claim a declaration to be answerable in damages in respect of all claimants only to the extent of 8*l.* per ton in the aggregate. How would that affect the "order for payment" already obtained against him? It cannot alter it. The Court of Chancery could not direct the Court of Admiralty to alter its order already properly made in a cause properly before it. The Court of Admiralty could not on the petition alter its order previously given in the cause. There is no such power mentioned in the statutes giving the power to declare the limitation. Upon such a petition, or in such a suit, the Court is directed to declare the amount of limitation, and to distribute such amount among the claimants. There is no other direction.

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The amount of one claim is, in the case supposed, already settled. There is no power to unsettle that amount. In such a state of circumstances, therefore, the amount of the shipowner's claim would be the amount already ascertained by the inquiry before the registrar as the amount to be paid and recovered, which would be the balance ascertained without reference to the limitation of liability.

If this would be the result where the application, by bill in Chancery or by petition in Admiralty, was made after the judgment declaring liability was given in the collision causes, could the result be different, ought it to be held to be different, where the application for limitation is made before such judgment is given? Upon such application for limitation the Court may or may not, "as it thinks fit," the statute says, restrain further proceedings in the collision causes. The present case is an instance. The Master of the Rolls has not stayed all further proceedings in the collision causes, but on the contrary, has directed further proceedings in the limitation cause to stand over, until the loss and damages which the plaintiffs and defendants the Royal Netherlands Steam Navigation Company have sustained have been assessed in the Admiralty Division. But if the Court in the limitation cause does not restrain further proceedings in the collision causes, it cannot give any direction as to the form of proceeding in those causes. Then the proceedings in those causes must follow the ordinary form. In such case, therefore, of cause and cross cause, and decrees or judgments therein declaring both ships to blame, the inquiry or inquiries before the registrar must proceed in ordinary form, and then the amount of loss or damage suffered by the vessels must be ascertained, and so the right to payment in favour of the party to be paid be ascertained, and the amount which he is entitled to be paid be ascertained, all in ordinary form. Then the Court acting in the limitation suit interferes and distributes the limitation amount. It seems to me impossible that the Court could in such case distribute upon a different amount than that thus ascertained. Where, therefore, the limitation action or application by petition is instituted after the judgment in a damage cause or causes, or where either of them is instituted before such judgment, but no order is made to

stay any proceeding in the damage causes, the 54th section of the Merchant Shipping Act, 1862, to be invoked as against several claimants, cannot prevent the more successful party from ascertaining in the usual way, and according to the usual rules, the amount of loss or damage primarily due to him. In such cases the phrase "answerable in damages" is applicable to the last proceeding only of the whole litigation, that is to say, to the distribution of the limitation amount among all parties. And if in such cases it would and could be applicable only to the last proceeding, it seems to me to follow that it ought only to be applied to the same last proceeding in all cases. If so, where the Court of Chancery in a limitation suit, or the Court of Admiralty on petition, thinks right to stop the proceedings in the Admiralty collision causes before the balance of the two losses is ascertained, and to ascertain itself the balance, it is bound, it seems to me, to ascertain such balance according to the ordinary rules, and not to apply the 54th section until after such balance is ascertained, and it is about to perform the last act, namely, to distribute the limitation amount.

It is suggested that by such a construction the plaintiff in the limitation cause, that is, the defendant in one of the collision causes, is deprived of his right to obtain a deduction in respect of the damage done to his ship. But it does not seem to me that such objection is well founded. He does obtain such deduction; such deduction is made in order to arrive at the rateable amount in respect of which the other shipowner's share of the distribution is to be paid to him. The amount for which such other shipowner is to prove is the balance between his loss and the loss of the plaintiff in the limitation cause. It is not this but the other construction which would, as it seems to me, work relative if not direct injustice. The owner of cargo in the one ship suing the other ship in the Admiralty, where both ships are pronounced to be in fault, can recover only half the loss or damage done to his cargo: *The Milan.* (1) But no deduction can be made from that half. Suppose, then, by way of example, cross causes by the two ships, and also a cause by owner of cargo against the ship claiming limitation.

(1) Lush. 388.

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Let the limitation amount of the ship *B.* be 2000*l.*

Let the damage to ship *A.* be 6000*l.*,

Half damage to *A.* is 3000*l.*

Damage to ship *B.* is 2000*l.*,

Half damage to *B.* is 1000*l.*

Damage to cargo in ship *A.* is 6000*l.*,

Half damage is 3000*l.*

Upon the construction of the Limitation Act adopted by the Master of the Rolls,

Ship *A.* would prove for 2000*l.*,

Cargo in ship *A.* would prove for 3000*l.*

But by force of the limitation statute neither could recover payment of the whole of his loss. The fund to distribute being 2000*l.*, ship *A.* would recover 800*l.*

Cargo in ship *A.* would recover 1200*l.*

But upon the opposite construction ship *A.*, though damaged to the extent of 6000*l.*, the half damage being 3000*l.*, would only be entitled to say that ship *B.* was liable to pay her 2000*l.* Ship *B.* damaged to 2000*l.* would claim 1000*l.* Ship *A.* would prove only for 1000*l.* The cargo in ship *A.* would still prove for 3000*l.*; the fund to be distributed being still 2000*l.*, ship *A.* would only recover 500*l.* Cargo in ship *A.* would recover 1500*l.* The Limitation Act was passed solely in favour of ship *B.* Why, without any advantage whatever to ship *B.*, should it be construed as thus to alter the relative rights of ship *A.* and the cargo in ship *A.*? A statute, for purposes of public policy derogating to the extent of injustice from the legal rights of parties, should be so construed as to do the least possible injustice. This statute whenever applied must derogate from the direct right of the shipowner against the other shipowner. Upon the construction suggested by the appellants it would derogate also from his relative rights as regarding other parties. It should be so construed as to derogate as little as possible, consistently with the phraseology, from the otherwise legal rights of the party. It seems to me that the phrase of "answerable in damages" may be, and therefore on this last rule of construction ought to be, applicable to the last step in litigation, that is to say, to the damages which but for this section would be ultimately payable by the person seeking its protection. It need

not, and therefore ought not, to be applied until the last stage is reached. If so, it leaves untouched all the precedent steps necessary to ascertain the amount of that last payment, which but for it would have to be made. In the present case, therefore, it is not to be applied until the balance, which would otherwise be payable to the owners of the *Vesuvius*, is ascertained by the same rules as it would be ascertained irrespective of the Limitation Act. That result is effected by the order of the Master of the Rolls. In my opinion that order is right, and ought to be affirmed.

In consequence of the arguments used before us I have given reasons for my judgment more technical than those given by the Master of the Rolls for his; I however entirely agree with him in the larger reasons given by him for his judgment.

COTTON, L.J. The facts of the case have been fully stated by Lord Justice Baggallay, and it is unnecessary for me to repeat them.

The appeal is against so much of an order of the Master of the Rolls as declares that the defendants the Steam Navigation Company are entitled to prove for one moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steamship *Savernake*, which was the ship belonging to the plaintiffs in this suit, and against the directions consequential on that declaration.

The plaintiffs, the owners of the *Savernake*, commenced an action to obtain the protection given by the 514th section of the Merchant Shipping Act, 1854.

Under an order of the Master of the Rolls the plaintiffs paid into court the sum fixed by sect. 54 of the Merchant Shipping Act of 1862, as the amount of their liability, and are entitled to the benefit of that section.

When an action is commenced and money paid into court under sect. 54, to which I have just referred, the liability is, under the Act of 1862, provided for by proof against the fund paid into court.

The Acts provide that the sum paid into court shall be the limit of the statutory liability for the loss or damage by reason of the improper navigation of the ship. The effect of the order of the

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Master of the Rolls is to deprive the owners of the *Savernake* of the amount of half the damage occasioned to their vessel, for which the owners of the *Vesuvius* were by the order of the 24th of July, 1876, in the Admiralty Court condemned or declared to be liable, and it does so for the purpose of satisfying a portion of the amount of the damage sustained by the *Vesuvius* by reason of the improper navigation of the *Savernake*, which under the Acts referred to is to be provided for solely out of the fund in court. This is apparently against the words and meaning of the Merchant Shipping Acts, and the provisions therein contained limiting the liability of the owners of the *Savernake;* and certainly is so, if the amount assessed as half the damage to the *Vesuvius* is the damage for which the owners of the *Savernake* would, independently of the Act, be answerable. But it is attempted to support the order appealed from by urging that in the Admiralty Court a monition to enforce payment in such cases is issued only for the balance of the moiety of the loss sustained by the greater sufferer, after deducting the moiety of the loss sustained by the other vessel. This, in fact, is the case, and on this it is contended, and I understand this was the view of the Master of the Rolls, that the action and cross-action in the Admiralty Court, and all the proceedings therein up to and including the monition, are means taken to ascertain one set only of damages, viz., that to which the greater sufferer is entitled, that being the balance mentioned in the monition. I am unable to agree with this view. The monition would have been preceded by the decree of the 24th of July, 1876, in which both vessels were declared to be in fault, and each was condemned in a moiety of the claim of the owners of the other vessel. A monition is, according to the practice of the Admiralty Court, the first step in the process to enforce payment, not the declaration of liability; and though it issues only for the balance of the sums for which the parties have been declared liable each to each, yet this, in my opinion, is done only as a matter of convenience to work out the result of the cross-claims, and to avoid process being issued by each party against the other. It is said that the monition is the judgment. This depends on the meaning in which that word is used. It is so in the sense of being the order on which process to enforce payment is issued, but in my

opinion it is not so in the sense of being the order of the Court, which declares and establishes the liability. What takes place is, in my opinion, like what frequently occurs in proceedings in the Court of Chancery, where parties have cross-claims against each other, the amount of which depends upon accounts or inquiries to be taken or made in chambers. In such cases the decree declares the liability of each, the necessary accounts to ascertain the amount are directed, and the decree on further direction directs payment of the balance only. It is suggested that there will be a difficulty if the owners of the *Vesuvius* proceed in the Court of Admiralty, not only to have the amount of the damage sustained by each ship ascertained, but to obtain a monition for payment, that this would be for the balance of one-half of the loss sustained by each vessel, and that they must be admitted to prove for this balance. Looking to the form of the order of the Master of the Rolls, it can hardly be supposed that he intended the proceedings in the Court of Admiralty to be carried on till the monition for payment was obtained. But if a monition were obtained in this case, it would not be right, if the view which I take is otherwise correct, that it should be for the balance of half the damage sustained by the *Vesuvius*, after deducting half the damage sustained by the *Savernake*. For under the circumstances there can be no set-off, as the owners of the *Savernake* have claimed the benefit of the limited liability given by the Act, which leaves to the owners of the *Vesuvius* a right to be paid a dividend only on the damage sustained by that ship, while they, the owners of the *Vesuvius*, remain liable in full.

For these reasons I agree with Lord Justice Baggallay that the order appealed from must be reversed, and that the defendants, the owners of the *Vesuvius*, must rank against the fund in court for the entire amount of the moiety of the damage to which they have been declared entitled.

Solicitors for plaintiffs: *T. Cooper & Co.*

Solicitors for defendants: *Pritchard & Sons; Stokes, Saunders, & Stokes.*

1879
May 21, 26.

[IN THE COURT OF APPEAL.]

THE CASSIOPEIA. (1879 V. 19.)

VAUGHAN *v.* OWNERS OF THE CASSIOPEIA.

Practice—Service of Amended Writ—Admiralty—Service on Registrar—Action in rem—Rules of Court, Order IX., rules 10, 13; *Order XIX., rule* 6; *Order XXVII., rule* 10.

An amended writ must be served in the same way as if it had been an original writ.

After the writ in an action in rem in the Admiralty Division against a ship had been filed and served on the ship, the ship was sold in an action brought by another party, and the proceeds of the sale brought into court. The writ was then amended and filed in the Admiralty Registry, but was not formally served on the registrar, nor was it indorsed with the date of service under Order IX., rule 13. The defendants did not appear:—

Held, that the service of the amended writ was not sufficient, and the plaintiff was not entitled to obtain judgment by default.

In this case Messrs. S. Vaughan & Co., on the 17th of January, 1879, brought an action of necessaries in rem against the *Cassiopeia*, which was a colonial ship, for the sum of 703*l.*, due to them for necessaries supplied to the ship. They served the writ on the ship which was then lying in the port of Hull, by attaching it to the ship in the ordinary way. The ship was at that time under arrest in an action in rem instituted on behalf of a claimant for wages.

The owners of the ship did not appear in this action. On the 27th of February the plaintiffs obtained leave to amend their writ by making S. Vaughan, one of the members of the firm of S. Vaughan & Co., a co-plaintiff, and adding a claim as mortgagees of thirty-six sixty-fourths of the ship for the same sum of 703*l.*, in the name of S. Vaughan, as trustees for them. No terms were imposed on the plaintiffs on amending their writ.

This amended writ was filed by the plaintiffs' solicitor in the Admiralty Registry, by amending the copy of the original writ which had been filed, and at the same time amending the original writ and filing it in the office. But the writ was not formally served on the registrar, nor was it served on the owners or the ship.

The plaintiffs subsequently filed a statement of claim and

affidavits in support of it; and then filed notice of motion for judgment in default of appearance on the amended writ, but the Judge of the Admiralty Court refused the motion on the ground that there had been no service of the amended writ.

The plaintiffs appealed from this decision.

On the hearing of the appeal it appeared that on the 5th of February, before the writ was amended, the ship had been sold in the prior action, and the proceeds paid into court.

Phillimore, for the plaintiffs. The fact that the ship was sold was not brought to the attention of the Judge of the Admiralty Court. According to the practice of the Admiralty Court, both before and since the Judicature Act, when a ship is sold and the proceeds paid into court, the service of a writ in an action in rem on the registrar is sufficient: Order IX., rule 10; Order XIX., rule 6. But, independently of the fact of the ship having been sold, the service of the amended writ on the registrar was sufficient. Under the new practice an amended writ is to be served on the defendants' solicitor, if the defendant has appeared by a solicitor, and if there has been no appearance it would seem that it is simply to be filed: Order XXVII., rule 10; *Caldwell* v. *Pagham Harbour Reclamation Company*. (1) At all events the practice is uncertain, and it would be convenient if a general rule were laid down as to the service of amended writs in all the Divisions.

JESSEL, M.R. The plaintiffs served the amended writ in the only way in which they could serve it under the circumstances of the case. If the judge's attention had been called to the fact that the ship had been sold he would doubtless have allowed the plaintiffs to obtain judgment. You can now take judgment on your motion, subject to the usual reference as to the amount of the debt.

JAMES, L.J. I am of the same opinion. As to the general point of practice, although it is not in question in this case, I may state

(1) 2 Ch. D. 221

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my strong opinion that an amended writ must be served in the same manner as if it had been an original writ.

BRETT, L.J., concurred.

May 26. *Phillimore*, mentioned the case again. He stated that the registrar declined to draw up the order on the ground that the writ had not been served on the registrar, but only filed in the office; and also that Order IX., rule 13 had not been complied with, which provides that the writ of summons shall be indorsed within three days of the service with the date of the service. He contended that what had been done amounted to service on the registrar, and that the order had been substantially complied with, though not in form. He referred to *Dymond* v. *Croft*. (1)

BRETT, L.J. You have two difficulties. You did not serve the registrar; you did not intimate that you intended it to be a service; you only delivered it to a clerk in the registry for the purpose of having it filed. And you did not indorse it with the date of service, in compliance with Order IX., rule 13.

Phillimore. Will it be necessary to give fresh notice of motion for judgment?

BRETT, L.J. We remain of the same opinion as we expressed on the former occasion; namely, that when a writ is amended as this has been so as to introduce a new claim, it must be served in the same way as if it had been an original writ. We give no opinion as to the effect of our decision on the proceedings which have been taken in the meantime.

JAMES and COTTON, L.JJ., concurred.

Solicitors for plaintiffs: *Speechly, Mumford, & Co., agents for J. W. Carr, Liverpool.*

(1) 3 Ch. D. 512.

THE JACOB LANDSTROM. (1878. K. 5.)

1878
Dec. 17.

Practice—Salvage—Salvors having different Interests—Refusal to consolidate—Tender in both Actions.

In a case where two actions of salvage were instituted, on behalf of plaintiffs having adverse interests against the same vessel, to recover salvage reward in respect of services rendered on the same occasion, the Court, on the plaintiffs refusing to consent to a consolidation order, allowed the defendants to make a single tender in respect of the claims in both actions.

On the 8th of December, 1877, an action of salvage, entitled *The Jacob Landstrom*, 1877, O. No. 397, was instituted on behalf of the owners, masters, and crews of the smacks *Emblem*, *Welcome*, *Young Pheasant*, and *Reindeer*, against *The Jacob Landstrom*, her cargo, and freight; and on the 4th of January, 1878, another action of salvage, entitled *The Jacob Landstrom*, 1878, K. No. 5, was instituted on behalf of the owners, master, and crew of the steam-tug *Harwich*, the master and crew of the life-boat *Springwell*, and the owners, masters, and crews of the smacks *Volunteer* and *Albatross*, against the *Jacob Landstrom*, her cargo and freight. Separate appearances were entered in each action, and statements of claim in each action were delivered respectively on the 24th of December, 1877, and on the 23rd of January, 1878.

The statement of claim delivered in the first above-mentioned action, alleged that on the 3rd of December, 1877, the *Emblem* and the *Welcome* had found the *Jacob Landstrom* ashore on the Long Sand and abandoned, and that the next day, the *Young Pheasant* having in the meantime come up, the plaintiffs had succeeded at high water in backing the *Jacob Landstrom* off the sand. That afterwards the *Volunteer* and the *Albatross* came up, having on board the mate of the *Jacob Landstrom*, and that under his instructions the plaintiffs subsequently rendered further services to the *Jacob Landstrom*.

The statement of claim delivered in the second above-mentioned action, after alleging that the plaintiffs in such action had, between 4 and 5 A.M. of the 3rd of December, 1877, found the *Jacob Landstrom* on the Long Sand, and burning flares, and that the life-boat *Springwell* had taken off the master and crew

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of the *Jacob Landstrom*, and started in tow of the *Harwich* to Harwich harbour, leaving the *Albatross* in charge of the *Jacob Landstrom*, by the desire of her master, proceeded, in the 8th, 10th, and 11th paragraphs, substantially as follows:—

8. Several smacks came up and hailed the *Albatross*, and hearing she had charge of the *Jacob Landstrom* sailed away. Two Colchester (1) smacks, however, stayed by, and their crew, though warned, proceeded to get on board the *Jacob Landstrom*, whereupon some of the *Albatross'* crew again went on board the *Jacob Landstrom*, and endeavoured to prevent their doing damage. As the tide and sea rose all were obliged to leave.

10. On the morning of the 4th the *Volunteer*, with the mate of the *Jacob Landstrom* and an agent acting for her at Harwich came up to the *Albatross*, and the two waited till 11 A.M., when it was high water. The wind was N.E. and it was fair weather, but there was a very heavy sea. The Colchester smacks which were laying-by, were again warned by the agent and the mate of the *Jacob Landstrom* not to interfere. Two other Colchester smacks now came up. (1)

11. At the top of high water the *Jacob Landstrom* floated off with the assistance of the sails, which had been set aback, and the plaintiffs from the *Volunteer* and *Albatross* went on board her and proceeded to navigate her, though they were much interfered with by the men from the four Colchester smacks, some of whom, though repeatedly warned, pressed on board her.

The defendants in the action, 1877, O. No. 397, on the 28th of February gave notice to the plaintiffs in both actions, that the judge in Court would be moved to order that the two actions should be consolidated, or that, in the event of either of the plaintiffs objecting thereto, the defendants should be at liberty to make a tender in court in the action, 1878, K. No. 5, of a sum that they might deem sufficient to satisfy the claims for salvage in both actions. A similar notice of motion was also given in the action 1878, K. No. 5.

March 5. The two motions came on to be heard together.

E. C. Clarkson, appeared for the defendants in support of the motion.

W. G. F. Phillimore, for the plaintiffs in the action entitled the *Jacob Landstrom*, 1878, K. No. 5, refused to consent to the two actions being consolidated, and contended that the practice of the Court required that the defendants, if they were of opinion that

(1) The smacks mentioned in these paragraphs were the *Emblem*, *Welcome*, *Young Pheasant*, and *Reindeer*.

both sets of plaintiffs were entitled to remuneration as salvors, should make a separate tender in each action.

Stubbs, for the plaintiffs in the action entitled the *Jacob Landstrom*, 1877, O. No. 397, also opposed the motion on the same ground.

SIR ROBERT PHILLIMORE. The first question that comes before the Court is as to the power of consolidation. It is hardly necessary to say that it has always been considered a power incident to the whole case to order actions to be consolidated both in the case of wages and other suits. That is already laid down by Dr. Lushington in the case of *The William Hutt* (1), where Dr. Lushington said:

"But according to my knowledge the universal practice of the Court has been to consolidate actions where the decision of each action depends on precisely the same facts, and in salvage suits the Court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter, as in a case of collision by all the several owners of cargo in the vessel run down, and the Court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another."

I perceive that in the case of *The Melpomene* (2), decided by myself in 1873, I ordered two cases to be consolidated where the application was on behalf of the plaintiffs and resisted by the defendants. Nevertheless, the more recent practice of the Court has been not to force consolidation where the parties object to it and maintain that their interests are different. But although in these cases the Court has not compelled consolidation, it has always held it to be in its power to condemn the party refusing to consolidate in costs. In the present case I do not direct a consolidation of the actions, but there remains the further question whether it is not competent to the owners of the salved property to make one tender, and on the whole I am of opinion that it is quite clear that there are cases in which it would be impossible to make a separate tender in each action. Take the case of a derelict and two salvors setting up separate claims. It would be impossible for the owner to know what the services were. He would know

(1) Lush. 27. (2) Law Rep. 4 A. & E. 129.

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the value of the vessel and of the cargo, but it would be impossible for him to ascertain the separate value of the services rendered by each. It is therefore quite clear that there must be cases in which it would be unjust to call upon the owner of the property to make a separate tender. I am of opinion that the present case falls within the category of such cases. I order a single tender for the whole services rendered to the ship, the defendants to elect, if they choose, in which action it is to be paid in. (1)

Solicitors for plaintiffs in action K. No. 5, 1878: *Tatham, Oblein, & Nash.*

Solicitors for plaintiffs in action O. 397, 1877: *Lowless & Co.*

Solicitors for the owners of the *Jacob Landstrom: Stokes, Saunders, & Stokes.*

(1) The following order was drawn up in action 1877, O. No. 397 :—

March 5. The judge having heard counsel on both sides in this action and in action 1878, K. No. 5, made no order upon the defendants' application to consolidate, counsel for the respective plaintiffs objecting to such consolidation; but he nevertheless gave leave to the said defendants to make a tender in one of the said actions in respect of the claim in both actions.

In obedience to this order the solicitors for the owners of the *Jacob Landstrom* brought the sum of 320*l.* into court as a tender, and served on the respective solicitors for the plaintiffs in each action a notice of tender, which mutatis mutandis was in the following form : —

"We, Stokes, Saunders, & Stokes, in pursuance of an order of the judge on the 5th of March in this action, hereby tender to the plaintiffs in this action and in action O. No. 397 the sum of 320*l.* in satisfaction of their respective claims for salvage, together with the taxed costs.

"April 30, 1878."

On the 6th of May, 1878, the solicitors for the plaintiffs in the action, 1878, K. No. 5, accepted the tender, and on the 29th of June, on the plaintiffs in the action, 1877, No. O. 397 objecting to the amount of the tender being paid out of court, unless the whole or a portion thereof was paid to them, obtained an order from the registrar that the statements of claim in the two actions should be exchanged between the plaintiffs thereto, and that supplementary pleadings should be entered into on the question as to the disposal of the amount tendered. Subsequently, on the 2nd of December, the owners of the *Jacob Landstrom* and their bail were dismissed by the registrar from the two actions and from all further observance of justice therein. On the 17th of December the solicitors for the owners of the *Jacob Landstrom* applied to the judge that the amount brought into Court as a tender should be paid to them for the use of their parties, and the judge granted the application; the solicitors for the respective plaintiffs having consented thereto.

THE POMMERANIA. (1879. O. 6.)

1879
Jan. 14.

Practice—Substituted Service—Discontinuance—Rules of the Supreme Court, Order XXIII., rule 1.

A written notice by plaintiff's solicitors "we are instructed to proceed no further with the action" is a sufficient notice of discontinuance within Order XXIII., rule 1.

Foreign shipowners commenced an action in this country in respect of a collision at sea, and then discontinued the action. An order was made afterwards for leave to serve a writ, in an action respecting the same collision, issued against them at the suit of the defendants in the former action, by way of substituted service upon the solicitors who acted in the former action as the solicitors for the foreign shipowners.

Upon its appearing that the solicitors had ceased to act for the foreign shipowners, the order was set aside.

This was an action of damage in personam, instituted on behalf of the owners of the British barque *Moel Eilian*, against the owners of the German ship *Pommerania*, to recover damages sustained in a collision between the two vessels in the English Channel, in the month of November last. The writ in the action was taken out on the 7th of January in this year, by Messrs. Pritchard & Sons, who on the same day applied in the registry for leave to serve the same, by way of substituted service, on Messrs. Stokes, Saunders, & Stokes, and in support of their application, brought in an affidavit alleging, inter alia, as follows:—

The defendants in this action are the owners of the steamship *Pommerania*, and in the month of November last, commenced an action in rem in the Admiralty section of the Probate, Divorce, and Admiralty Division of this Court against, and arrested the barque *Moel Eilian*. The said action is still pending, and bail has been given therein for the *Moel Eilian*.

The said plaintiffs in the said action in rem, and who are the defendants in this action, as I am informed and verily believe, are all of them resident in the empire of Germany, and legal service of the said writ cannot be effected upon them personally; but Messrs. Stokes, Saunders, & Stokes, have acted and are still acting as the solicitors of the said defendants the plaintiffs in the said action in rem; and I verily believe that service of the writ issued in this action upon the said Messrs. Stokes, Saunders, & Stokes, would effectually bring this action to the knowledge of the said defendants.

The registrar having heard counsel, granted the application, and on the 8th of January, substituted service of the writ, together

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with a copy of the above-mentioned affidavit and of the registrar's order was duly made on Messrs. Stokes, Saunders, & Stokes.

W. G. F. Phillimore, on behalf of Messrs. Stokes, Saunders, & Stokes, moved the judge in court, to set aside the service of the writ and the order permitting substituted service, and all subsequent proceedings in the action, and to direct that the costs of and incidental to the motion, might be ordered to be paid by the plaintiffs. He relied on an affidavit in which one of the members of the firm of Messrs. Stokes, Saunders, & Stokes, deposed to the following statements:—

On the 27th November, 1878, I, being instructed to do so on behalf of the underwriters of the *Pommerania*, issued a writ in rem, 1878, O., No. 356, against the owners of the vessel, *Moel Eilian* and her freight, endorsed with a claim for damages for the loss of the *Pommerania* and her cargo, by collision with the *Moel Eilian*

Upon the said 27th day of November, 1878, the said *Moel Eilian* was arrested upon a warrant taken out by us in the aforesaid action, and on the same day, Messrs. Pritchard & Sons, solicitors, entered an appearance on behalf of the owners of the *Moel Eilian*, and bail was given in the said action.

The appearance demanded the delivery of a statement of claim. But before any statement of claim was delivered I was instructed on behalf of the aforesaid underwriters to discontinue proceedings.

Accordingly, on the 3rd of January, 1879, I gave the defendants notice in writing of discontinuance, by writing to Messrs. Pritchard & Sons, a letter in the words and figures following.

"31, Great St. Helen's, E.C., 3 January, 1879.

"*Moel Eilian.*

"Dear Sirs,—We are instructed to proceed no further with this action. We presume you do not require a formal order dismissing it. Yours truly,

"Stokes, Saunders, & Stokes."

I received no answer to the said letter.

I have never had any instructions from the owners of the *Pommerania*, nor have I acted in their behalf or in their name, except in bringing and discontinuing the aforesaid action. I am not now instructed or acting on behalf of the aforesaid underwriters, and I have no authority to act on behalf of either owners or underwriters.

The collision in the case occurred on the high seas.

E. C. Clarkson, for the owners of the *Moel Eilian,* referred to Rule 171, of the Admiralty Court Rules of 1859.

SIR ROBERT PHILLIMORE. I think that the letter, the contents of which are set out in the affidavit in support of the motion, was such a notice in writing as is provided for by Rule 1 of Order XXIII.

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of the Rules of the Supreme Court. The action, instituted on behalf of the owners of the *Pommerania* against the *Moel Eilian*, having therefore been wholly discontinued on the 3rd of January, the subsequent order of the 8th of January, permitting substituted service of the writ in the action against the owners of the *Pommerania*, must have been made by the registrar in ignorance of the real facts of the case. The motion now before the Court must be granted with costs.

Solicitors for owners of the *Moel Eilian*: *Pritchard & Sons.*

Solicitors for owners of the *Pommerania*: *Stokes, Saunders, & Stokes.*

THE HANKOW. (1879. B. 250.)

March 18.

Ship—Damage—Compulsory Pilotage—6 *Geo.* 4, *c.* 125, *s.* 59—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 370, 376—*Port of London.*

The master of a vessel belonging to the port of London and bound up the Thames, on a voyage from Australia to London with passengers on board, is required by law to employ a licensed pilot within the limits of the port of London.

THIS was an action of damage brought by the owners of the steam-tug *Nelson* against the steamship *Hankow*. The collision took place in the river Thames, near Rising Sun Point. The defendants, the owners of the *Hankow*, by their statement of defence, denied that the *Hankow* was to blame for the collision, and alleged that at the time of the collision the *Hankow* was being navigated by a duly licensed pilot in charge of the *Hankow* by compulsion of law; and alleged that if the collision was occasioned by any negligence of any one on board the *Hankow*, it was solely caused by the negligence of the pilot.

On the 8th of March the case came on for hearing, and it appeared that at the time of the collision the *Hankow* was bound from Sydney, in New South Wales, to London, laden with cargo, and carrying passengers. London was her port of registry; she had on board a duly licensed Trinity pilot, and it was admitted that the collision occurred within the limits of the port of London. The Secretary to the Trinity Corporation was called

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by the defendants, and he produced a charter granted to the Trinity Corporation by King James II., which was put in evidence. (1)

The material portions of the charter are in substance as follows:—

"James the Second, by the grace of God, of England, Scotland, France, and Ireland, King, Defender of the faith, &c., to all to whom these presents shall come, greeting. Whereas our well-beloved lieges and subjects, shipmen and mariners of this our realm of England, consisting of Master, Wardens, and Assistants of the Guild or Fraternity of the Most Glorious and Undivided Trinity, and of St. Clement, in the parish church of Deptford Strond, in our county of Kent, are, and have been of long time, a corporation, and have enjoyed sundry grants, liberties, privileges, and immunities by force of divers charters and letters patent, heretofore made unto them by several Kings and Queens of this realm, and whereas the said Master, Wardens, and Assistants have humbly besought us to renew and confirm their said charters, and to grant unto them further authorities and privileges.

"Know ye therefore that we .... have of our especial grace, certain knowledge, and mere motion, given, granted, and confirmed, and by these presents, for us, our heirs and successors, do give, grant, and confirm unto our said trusty and well-beloved subjects, the Master, Wardens, and Assistants of the said Guild; that they from henceforth be and shall be called and accounted one body corporate and politick in deed and in name, and by the name of the Master, Wardens, and Assistants of the Guild, Fraternity, or Brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement, in the parish of Deptford Strond, in the county of Kent..... And for that many times unskilful and indiscreet persons, not having knowledge or due understanding either of our channel or how to guide and govern ships or other vessels aright, have taken upon them to be pilots, loadsmen, and guides for the safe bringing up of strangers' ships, hoyes, flyboats, barks, or other vessels into our river of Thames, and for want of such knowledge and understanding have cast away the said ships and other vessels, to the great annoyance and decay of our said channels and loss and hindrance both of our merchants and others going ordinarily to sea, and to the slander and evil report of the more skilful and better sort of our seamen and mariners amongst foreign nations using the traffick hither. For reformation whereof our will and pleasure is, and by these presents, for us, our heirs and successors, we do give and grant unto the said Master, Wardens, and Assistants, to their successors, and do straitly charge and command that no manner of seamen, or mariners, or other person whatsoever, at any time hereafter shall take upon him or them, or otherwise presume to suffer themselves to be pilots, loadsmen, or guides to or for the bringing in or carrying forth of the river of Thames, or any other creek belonging or running into the same, of any ship or other vessel, by what name or names soever they shall be called, except such person or

(1) A printed edition of the charter published in 1763 is in Lincoln's Inn Library.

persons so taking upon him or them such pilotship, loadsmanage, or guidance shall be thereunto first appointed and authorized by the said Master, Wardens, and Assistants .... And moreover that no such ship or other vessel (whereof any alien or stranger, not being born within or under our obeysance, shall be owner or part owner) shall go down or out of the said river of Thames to seawards, without a pilot, loadsman, or guide to them, in that behalf assigned and appointed in writing by the said Master, Wardens, and Assistants..... And also, that from henceforth no seaman or mariner shall presume to take upon him or them to be a master, pilot, loadsman, or guide of or to any ship or vessel whatsoever, to sail, go, or put forth of the said river of Thames, or any other creeks thereof, into the seas, or from the seas homewards into the said river of Thames, or any creek thereof, other than such as shall have been first examined by the Master, Wardens, Assistants, and Elder Brethren .... and from them shall have obtained a certificate in writing, under the seal of the said corporation, shewing and testifying thereby the countries, coasts, and places to and for which he, they, and every or any of them, shall be sufficient, apt, and meet to take such charge upon them; and after that, also an approbation or allowance thereof, of and from the Lord High Admiral for the time being .... upon pain to forfeit for every such time of his or their doing to the contrary therein the sum of twenty pounds of lawful money of England to be levied of his or their goods or chattels by way of distress to be taken by one of the said Wardens or his deputy for the time being. . . . ."

At the hearing the learned judge decided that the *Hankow* was alone to blame for the collision, and that the collision was solely caused by the orders of the pilot in charge of the *Hankow*, which were duly carried out by the master and crew of the *Hankow*.

On the 17th and 18th of March the question whether the employment of the pilot was compulsory came on for argument.

Milward, Q.C., and *Verney* (*W. G. F. Phillimore*, with them) for the defendants. The collision occurred within the limits of the London pilotage district, within which by the Merchant Shipping Act, 1854, s. 376, pilotage is compulsory, subject to any alteration to be made by the Trinity House and to the exemptions contained in the Act. No alteration has been made by the Trinity House, and the only provision of the Merchant Shipping Act which can have any application to the present case is that contained in the 353rd section, by which all exemptions from compulsory pilotage existing immediately before the Act came into operation are continued. This enactment preserves the exemption contained in 6 Geo. 4, c. 125, s. 59, in favour of vessels when within the ports to which they belong. The exemption in question is however expressly confined by its terms to vessels belonging to ports or places in relation to

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which no particular provision for the appointment of pilots has been made by Act of Parliament or charter. The defendants have produced the charter of the London Trinity House granted by King James II., and have proved that that charter contains provisions for the appointment of pilots in the river Thames. The defendants have therefore sufficiently shewn that prior to 6 Geo. 4, c. 125, "a particular provision for the appointment of pilots" was made by charter with reference to the place where the collision occurred. Indeed the preamble of 6 Geo. 4, c. 125, it is itself sufficient evidence that such particular provision had been made.

E. C. Clarkson, for the plaintiffs. The decision of Dr. Lushington in *The Stettin* (1) is binding on the Court, the contents of the charter of James II. must have been well known when that case was decided; and in fact it was unnecessary to refer to its provisions, as the attention of the Court must have been called to the language of the preamble of 6 Geo. 4, c. 125. The decision of the Court of Admiralty in the case of *The Stettin* (1) is supported by the opinion of the Lord Chief Baron Kelly in the subsequent case of the *General Steam Navigation and Colonial Co.* v. *British and Colonial Steam Navigation Co.* (2); and there is no doubt that in that case the charter of James II. was before the Court. The case of *The Killarney* (3) is not in point, and was rightly not referred to in the case of *The Stettin* (1), for in the former case it was proved to the Court that a particular provision had been made by 52 Geo. 3, c. 39, s. 21, for the appointment of pilots by the Hull Trinity House for ships into or out of ports within their jurisdiction; within such jurisdiction the port of Goole was undoubtedly included. In the present case no such particular provision has been shewn to have existed with respect to the port of London. In other words, the powers with respect to the appointment of Trinity House pilots on which the defendants rely are not particular provisions in relation to the appointment of pilots for the port of London; and the terms of the section are not satisfied by proof that the charter of James II. conferred on the Trinity House a general power of controlling pilots and

(1) Br. & L. 199. (2) Law Rep. 3 Ex. 330; 4 Ex. 238.
(3) Lush, 427.

pilotage in the river Thames, or indeed of appointing pilots to conduct vessels up the Thames.

Milward, Q.C., in reply.

SIR ROBERT PHILLIMORE. This is a case where the statutes are so very conflicting that the Court, if it had the option, would hesitate to give its decision. By the 376th section of the Merchant Shipping Act, 1854, it is enacted as follows: "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory, are the London district. . . ."

The 370th section of the same Act provides that the London district shall comprise the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south. Now it is admitted that the collision took place above Gravesend. If the sections I have referred to remained alone, and this case could be decided without the necessity of reference to any others, the law would be clear that pilotage was compulsory upon the owners of the *Hankow*. The question, however, turns upon the General Pilotage Act of 1825 (6 Geo. 4, c. 125), the 59th section of which contains the following material provisions:

> Provided always, and be it further enacted, that for and notwithstanding anything in this Act contained, the master . . . . of any ship or vessel not exceeding the burden of 60 tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots, shall and may lawfully and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

Now at the time of the collision, the vessel was within the port of London, the port or place to which she belonged, and therefore the question arises whether her owners were entitled to the benefit of the exemption contained in the section I have just read. That I think depends upon whether the charter of the Trinity House

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amounts to a particular provision so as to satisfy the words of the section? I am of opinion that it does. The point was before my learned predecessor twice, once in the case of *The Killarney* (1), and once in the case of *The Stettin* (2); and what surprises me is, that when the whole of the subject-matter was discussed in the latter case no reference was made to the charter of the Trinity House, and none to the case of *The Killarney*. (1) In *The Killarney* (1) Dr. Lushington says, speaking of this exemption of compulsory pilotage:

"One of these exemptions (the only one at all applicable to this case) is that a master may pilot his own ship—that is what I am not dealing with now; and he goes on to say, whilst the same is within the limits of the port or place to which she belongs. Here the *Killarney* was in Goole, to which port she belonged, and, accordingly, proceeding thus far only, this case would appear to be within the exemption, and the pilotage would be voluntary only. But there is an exemption to this exemption, for the section goes on to say, 'The same, "that is, the port or place" not being a port or place in relation to which particular provision has heretofore been made by any Act or Acts of Parliament, or by any charter for the appointment of pilots.' The whole case, therefore, comes to this, had any particular provision been made in relation to Goole before the year 1820 by any Act of Parliament or by any charter for the appointment of pilots? If there had been the exemption just mentioned did not attach and the pilotage was compulsory."

Then he went on to find that there was an Act of Parliament which brought Goole within the operation of the exemption in the statute. So, in the case of *The Stettin* (2), the same learned judge is reported as saying:

"I am well aware that to put one construction upon the 59th section of the Pilot Act, and another upon the 379th section of the Merchant Shipping Act (3) tends to create some confusion; but I cannot help myself, for the legislature has used different expressions, conveying, as I think, different meanings. Then follow the words, 'The same not being a port or place in relation to which particular provision has heretofore been made by any Act of Parliament.' Now, I am aware of no such Act of Parliament, and no such Act has been mentioned, so I must conclude that there is none. The result is that I must hold that the steamer was exempt from compulsory pilotage."

But there is no reference to the charter of the Trinity House in

(1) Lush, 427.

(2) 31 L. J. (P. M. & A.) 208. The passage cited does not occur in the report of the same case in Br. & L. 199.

(3) This section provides, inter alia, that ships navigating within the limits of the ports to which they belong shall, when not carrying passengers, be exempted from compulsory pilotage in the London district.

that case, and it is more than probable that it never was brought to Dr. Lushington's attention on that occasion, and it does not appear to have been present to his mind. I find some difficulty in discovering why the decision in *The Killarney* (1) is not referred to in the case of *The Stettin*. (2) One other case has been referred to which I ought not to pass by, and that is the case of the *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (3) I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgment; therefore I must put that case aside. Upon the whole, I am of opinion that it is proved in this case that the pilotage was compulsory, inasmuch as the collision occurred in a place to which the exemptions from compulsory pilotage preserved by the 6 Geo. 4, c. 125, s. 59, do not apply.

On the previous occasion the Court found that the collision was solely brought about by the negligence of the pilot of the *Hankow*. The result therefore will be that the action will be dismissed.

In the uncertainty of what really was the law, I think the plaintiffs were justified in coming here, and taking this circumstance into consideration, I think I shall do justice if I dismiss the action without costs.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Cooper & Co.*

(1) Lush, 427. (2) Br. & L. 199.

(3) Law Rep. 3 Ex. 330.

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April 8.

THE MARY HOUNSELL. (1879. O. 83.)

Ship—Damage—Pilot-Cutter in tow of sailing Vessel—Regulations for preventing Collisions at Sea, Articles 2, 5, 8—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

A brigantine with a cutter towing astern came into collision with another brigantine in the Bristol Channel after dark. Both brigantines had the regulation side lights exhibited, but the cutter had only a white light exhibited at her masthead, and the brigantine towing the cutter was sailing close-hauled on the starboard tack whilst the brigantine which came into collision with her was going free :—

Held, that the Regulations for preventing Collisions at Sea had been infringed by the cutter, and that the vessel towing her was to be deemed in fault for the collision by virtue of the provisions of the 17th section of the Merchant Shipping Act, 1873. (1)

THIS was an action of damage instituted on behalf of the owners, master, and crew of the brigantine *Bessie* against the brigantine *Mary Hounsell*.

The statement of claim contained the following material allegations :—

1. Shortly after 6.30 P.M. on the 23rd of February, 1879, the *Bessie*, of 187 tons register, was off Barry Island.

2. At that time the wind was about north north-west, the weather was cloudy but clear. The *Bessie* was sailing close-hauled on the starboard tack under all plain sail, heading about west by north, and making from four to five knots an hour, with a pilot cutter sailing in tow of her. The regulation lights of both vessels were duly exhibited and burning brightly, and a good look-out was being kept.

3. In these circumstances those on board the *Bessie* observed the red light of a sailing vessel, which afterwards proved to be the *Mary Hounsell*, about 1½ miles distant, and about one point on the port bow. As the *Mary Hounsell* approached and got near the *Bessie*, the latter was kept as close to the wind as she could be

(1) Since the decision of this case an Order in Council (gazetted the 19th of August, 1879), has been issued, which is to come into force in September, 1880. The 9th article of the order provides as follows :—

"A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals which shall never exceed fifteen minutes.

"A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships."

got. The *Mary Hounsell* when about a cable's length off, altered her course, appeared to be starboarding her helm, opened her green light, and caused danger of collision; and, though she was loudly hailed to port her helm and the helm of the *Bessie* was ported, struck with her stem the port bow of the *Bessie*, doing her so much damage that she shortly afterwards went down.

4. A good look-out was not kept on board the *Mary Hounsell*.

5. The *Mary Hounsell* improperly neglected to keep out of the way of the *Bessie*.

The defendants the owners of the *Mary Hounsell* delivered the following statement of defence and counter-claim:—

Shortly before 6.45 P.M. on the 23rd day of February, 1879, the brigantine *Mary Hounsell*, of 160 tons register, was in the Bristol Channel, near Barry Island.

The wind at such time was about north-east by north, and not about north north-west, as alleged in the statement of claim; the weather was dark but clear, and the *Mary Hounsell* was on the port tack, sailing full and by, and heading about east by south half south, and proceeding at the rate of about four knots per hour through the water. Her proper regulation sailing lights were duly exhibited and burning brightly.

At such time three lights, apparently the red and green lights and masthead light of a steamer, were seen at the distance of about from a mile and a half to two miles from the *Mary Hounsell*, and bearing about half a point on her starboard bow. These lights proved to be the red and green lights of the *Bessie*, and a white light at the masthead of a vessel which she had in tow. The *Mary Hounsell* was kept full and by on the port tack. The *Bessie* shut in her red light, leaving her green light open on the starboard bow of the *Mary Hounsell*. The *Bessie* with the said vessel in tow approached, and under a port helm caused immediate danger of collision, and although the helm of the *Mary Hounsell* was put hard down, the *Bessie* with her port bow came into collision with the starboard bow of the *Mary Hounsell*, and did the *Mary Hounsell* considerable damage.

The *Bessie* and the vessel she was towing did not duly observe and comply with the regulations as to lights, but carried improper and deceptive lights.

The statement of defence contained other charges of negligence against the *Bessie*, and alleged that the collision was occasioned by negligence on the part of the *Bessie*, and that the defendants relied by way of counter-claim on the several statements and allegations therein contained. At the hearing witnesses were called on behalf of the plaintiffs and the defendants in support of their respective cases. The pilot who was on board the *Bessie* gave evidence to the effect that he was not licensed by any pilotage authority, and would have had to give up charge to any duly licensed pilot; that the cutter towing astern of the *Bessie* had been hired by him and other unlicensed pilots, but at the time of the

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collision had only one man on board and that no flares had been shewn from her before the collision. The result of the remainder of the evidence appears from the judgment.

Butt, Q.C., and *W. G. F. Phillimore*, for the plaintiffs. The cutter is a pilot cutter, and it was necessary under the provisions of the 8th article of the Regulations for preventing Collisions at Sea, that the cutter should exhibit a white light at her mast-head. If the *Mary Hounsell* had had an efficient look-out it must have been apparent to those on board her that the white light on the pilot-cutter was not shewn from the *Bessie*: *The Marmion* (1); *The Esk and Gitana.* (2)

Milward, *Q.C.*, and *E. C. Clarkson*, for the defendants. The cutter was not a licensed pilot-cutter, and the pilots belonging to her were unlicensed pilots. She was therefore not a pilot vessel within Article 8 of the Regulations for preventing Collisions at Sea. Moreover that article does not apply to pilot-vessels in tow of other vessels, and probably only to pilot-vessels when actually engaged in the service of supplying pilots, and in this case, the pilot-cutter had got rid of all her pilots. The Court must find that the *Bessie* was in fault under the 17th section of the Merchant Shipping Act, 1873. She was in intendment of law one vessel with the pilot-cutter, and ought not to escape the consequences of the neglect of the latter vessel to exhibit side lights.

Phillimore, in reply, referred to *The Columbus.* (3)

SIR ROBERT PHILLIMORE. I am of opinion that the *Bessie*, with the pilot-cutter attached to her by a rope, must be considered, in the application of the Regulations for preventing Collisions at Sea, as one vessel. And I am of opinion—and the Elder Brethren agree with me—that the white light which the pilot-vessel carried might possibly have misled the *Mary Hounsell.* The next question is whether there has been in this case any infringement of any of the articles of the Regulations for preventing Collisions at Sea. Now, whether the 5th or the 8th article of the Regulations applies, it appears to the Court that a conclusion must be drawn equally

(1) 1 Asp. Mar. Law Ca. 412. (2) Law Rep. 2 A. & E. 350.
(3) 2 Hagg. 178, n.

hostile to the case set up on the part of the *Bessie*. For, on the one hand, if the 5th article of the Regulations applies, or, in other words, if this cutter was a sailing-ship under weigh, or being towed, she falls under the express provision of that article which declares that a sailing ship under weigh or being towed shall never carry a white mast-head light; but if, on the other hand, the article to be applied is the 8th article of the Regulations, which declares that sailing pilot-vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast-head visible all round the horizon; then it must be observed, that that article, in the opinion of the Court, contemplates not a vessel being towed by another vessel, but an independent vessel; and in that case, the white light would not be misleading. In the result it appears to the Court that the cutter and the *Bessie* both infringed the Regulations for preventing Collisions at Sea, the cutter, by shewing a white light when she was being towed, and the *Bessie*, by allowing herself to proceed under the circumstances in such a manner that the white light of the cutter and the side lights of the *Bessie* appeared to an approaching vessel to be all three exhibited from the *Bessie*.

This being so, the Court has to consider whether there has not been in this case such an infringement on the part of the *Bessie* of the Regulations for preventing Collisions at Sea, as would render her liable to be deemed at fault within the provisions of sect. 17 of the Merchant Shipping Act, 1873, which enacts—

> If in any case of collision it is proved to the Court before whom the case is tried, that any of the Regulations for preventing collisions contained in, or made under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed, shall be deemed in fault, unless the circumstances of the case made departure from the regulation necessary.

There are no circumstances in this case that made a departure from the regulation necessary; and it has been held by the Judicial Committee of the Privy Council, that a vessel is to be deemed in fault under the section, in any case where the infringement of the regulations could by possibility have been contributory to the collision: *The Fanny M. Carvill.* (1) I have already said that, in my opinion, the white light of the pilot-cutter was a mis-

(1) 44 L. J. (Ad.) 34.

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leading light, and I must therefore pronounce the *Bessie* in fault for towing the other vessel exhibiting a white light.

The next question is this, whether the *Mary Hounsell* is not also to blame, and after conference with the Elder Brethren on this point, we are all of opinion that the story told by the *Bessie*, is the true story, and that she was close-hauled on the starboard tack, and that the *Mary Hounsell* had the wind free and ought to have got out of the way, which she did not do. I therefore pronounce both vessels to blame.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

March 1

THE EUDORA. (1879. S. 79.)

Practice—Bottomry—Arrest before Bond payable.

Where the holders of a bottomry bond, on ship and freight payable seven days after the arrival of the ship, being apprehensive that her cargo would be discharged forthwith, and their security diminished, instituted a bottomry suit, after the arrival of the ship and before the expiration of the seventh day, and arrested the ship, the Court, on the application of the owners of the ship, who had paid the amount of the bond and interest into court, condemned the plaintiffs in costs.

THIS was a motion on behalf of the owners of the ship *Eudora*, the defendants in an action of bottomry instituted against the *Eudora* and her freight, to direct the *Eudora*, which had been arrested in the action on the 22nd of February, 1879, to be released without bail, and to condemn the plaintiffs in damages, and in the costs of the motion, and all costs incurred by the institution of the action.

March 1. *E. C. Clarkson*, on behalf of the defendants, brought on the motion, and the Court, with the consent of *Myburgh*, counsel for the plaintiffs, ordered the vessel to be released on the amount of the bond and interest being paid, and adjourned the rest of the motion.

March 4. The motion was renewed. *Clarkson*, for the defendants, in support of the motion, referred to a stipulation in the

bottomry bond providing that if the advance on bottomry and the bottomry premium should be paid at or before the expiration of seven days after the safe arrival of the vessel at *London* the bond should be void, and to affidavits which alleged that the vessel arrived safely at *London* on the 22nd of February, 1879, and that the amount of the bond and the maritime interest thereon was tendered out of court to the plaintiffs' solicitors on the 27th of February. He contended that at the time of the institution of the action and the arrest of the vessel no cause of action existed.

Myburgh, for the plaintiffs, in opposition to the motion, referred to statements on affidavits that the bondholders had communicated with the persons interested in the vessel, but had received no intimation that the bond would be met when due, and that they had been apprehensive that the vessel would have been discharged before the expiration of seven days from her arrival, and the security for payment of the bond thereby diminished. The plaintiffs were warranted by the settled practice of the Court in instituting the action, and arresting the vessel, without waiting until the bond became payable: *The Jane* (1); *The San Jose Primeiro.* (2)

SIR ROBERT PHILLIMORE. I think this is not a case for damages, but so much of the motion as asks that the plaintiffs be condemned in costs must be granted.

Solicitors for plaintiffs: *Hollams, Sons, & Coward.*
Solicitors for defendants: *Lowless & Co.*

(1) 1 Dod. 461. (2) 3 L. T. (N.S.) 513.

1879
March 11.

THE CECILIE. (1879. E. 18.)

Bottomry—Jurisdiction—Bottomry Bond not providing for Payment of Interest.

The master of a Danish vessel being without funds or credit at Hamburgh, in order to obtain necessaries to enable his vessel to proceed on a voyage to Africa and back to London, obtained a loan on the security of instruments by which he pledged his vessel and bound himself for the repayment of the sum advanced within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind:—

Held, in an action of bottomry instituted against the vessel, that the instruments were valid bottomry bonds, and that the holders were entitled to payment out of the proceeds of the vessel of the sum advanced together with 4 per cent. interest from the time when the bonds became due.

THIS was an action of bottomry instituted on behalf of Elliot's Metal Company against the Danish schooner *Cecilie*.

The statement of claim, so far as material, alleged as follows:—

The *Cecilie*, a schooner of 126 tons register or thereabouts, belonging to the kingdom of Denmark, being about to proceed on a voyage from Hamburgh to Africa and thence to the port of London, funds were required to refit and repair the said vessel.

The master of the *Cecilie* being without funds or credit at Hamburgh, and being unable to pay the expense of the repairs and the necessary disbursements of the schooner at Hamburgh so as to enable her to prosecute her voyage, was compelled to resort to two several loans, together equal to 265*l.* 17*s.* 6*d.* sterling British money, on two bottomry bonds of the said vessel or schooner for the purpose of enabling him to pay the said expenses and disbursements, which sum Wilhelm Rodewaldt, of Hamburgh, at the request of the master by public advertisement and private contract with the said master, advanced to the said master, and accordingly the said master by two several bonds of bottomry by him duly executed bound himself and the said schooner and her appurtenances, to pay unto the said Wilhelm Rodewaldt, his assigns, or order, or indorsees, the said sums within six days after the arrival of the *Cecilie* at the port of London from the said intended voyage from Hamburgh to Africa.

The *Cecilie* subsequently proceeded on her voyage from Hamburgh to Africa, and thence to the port of London, and duly and safely arrived at the said port of London on the 23rd day of December, 1878.

The two several bonds in paragraph 2 herein mentioned were duly indorsed and assigned by the said Wilhelm Rodewaldt to the plaintiffs.

The bonds or instruments referred to in the statement of claim were both in the same form, and the following is a notarial translation of one of them:—

I, the undersigned captain of the Danish vessel named the *Cecilie*, hereby

acknowledge for myself and my heirs, the duplicate being valid as a single acknowledgment, that I am indebted to Mr. Wilhelm Rodewaldt, for provisions and equipment of the said vessel and for the prosecution of her voyage from Hamburgh to Africa and back to London, in the sum of 2739 marks and 35 pf., wherefore I pledge my ship and appurtenances, and bind myself to pay the above sum within six days after my arrival in London or wheresoever else I may put in; said payment to be prompt and uncontested according to the law of exchange in all parts.

No appearance was entered on behalf of the owners of the *Cecilie*, and the averments in the statement of claim having been verified by affidavit, counsel on behalf of the plaintiffs, on the 4th of March last, moved the judge in Court to pronounce for the validity of the bonds with interest and costs, and to order the ship to be sold. So much of the motion as asked the Court to pronounce for the validity of the bonds was opposed on behalf of material men, who claimed in respect of necessaries supplied to the *Cecilie*, and the Court ordered a sale of the vessel, but directed that the rest of the motion should stand over; all questions of priority and of the validity of the bonds being reserved.

March 11. The motion was again called on.

Butt, Q.C., and *H. R. Hodgson*, for the plaintiffs, in support of the motion. The bonds put in suit in this case are valid bottomry bonds. They were given by the master in a foreign port where he was without funds or credit, and it must be presumed from the language used that they were given for necessary charges to enable the ship to proceed on the voyage on which she was then engaged. All the other essentials of a bottomry contract are present in this cause, for it is apparent on the face of the bonds that the money was lent on the security of the ship, and was only to be repaid in the event of the ship not being lost on the voyage. The words "my arrival," must be construed as in the case of *Simonds* v. *Hodgson* (1) to mean "my arrival with the ship," or "my ship's arrival." It is true that the bonds do not provide for the payment of maritime interest, but that circumstance is immaterial, whereas in the present case the contract entered into is subject to sea risk. In the recent case of *The Elpis* (2)

(1) 3 B. & Ad. 50.

(2) Law Rep. 4 A. & E. 1.

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this Court held that a bond in form very similar to the bonds signed by the master in the present case was a valid bottomry bond.

E. C. Clarkson, for the material men, contrà. The bonds in this case are in an unusual form. The bonds are to become payable not only on the safe arrival of the ship at London, but at any intermediate port. Further, the bonds do not provide for the payment of interest, and it is almost impossible to conceive that the lender could have intended the loan to be subject to maritime risk, without making some stipulation for the payment of interest or premium to compensate him for such a risk. The instruments are not expressly declared to be subject to maritime risk, and having regard to the whole transaction as appearing on the face of the instruments, it is reasonable to conclude that the transaction is not really a bottomry transaction.

SIR ROBERT PHILLIMORE. I am not convinced by Mr. Clarkson's argument; on the contrary, I am satisfied that on the authority of precedents and decided cases, I must hold that the instruments in respect of which this action is brought are valid bottomry bonds. I, therefore, pronounce for their validity. The plaintiffs will be entitled to payment out of the proceeds of the ship of the amount due on the bonds; and also, in accordance with the practice of the Court, to the payment of interest on the same at the rate of 4 per cent. from the date when the bonds became due until payment thereof.

Solicitors for plaintiffs: *Harrisons.*
Solicitors for material men: *Waltons, Bubb, & Walton.*

THE ANDERS KNAPE. (1879. C. 111.)

1879
May 13.

Salvage—Service in the Nature of Pilotage rendered to Foreign Vessel which had received Damage.

A fishing-smack fell in near the Long Sand buoy with a foreign steamship. The steamship had been on the sands near the Kentish Knock light-ship, but had got off with some damage to her rudder, and had a signal for a pilot hoisted. The master of the smack boarded the steamship and piloted her to the entrance of Harwich harbour:—

Held, that the owners, master, and crew of the fishing-smack were entitled to salvage remuneration.

When a person goes on board of a vessel in distress, and pilots her into harbour, he is entitled to salvage remuneration, unless it is established that he has contracted to render the services for pilotage remuneration only.

THIS was an appeal from the City of London Court in an action of salvage instituted on behalf of the owners, master, and crew of the smack *Faith*, against the Swedish steamship *Anders Knape*, of 401 tons register.

The action was heard in the City of London Court on the 10th of March last, when *Bucknill* appeared for the plaintiffs, *Myburgh* for the defendants, the owners of the *Anders Knape*. In an affidavit of value filed on behalf on the plaintiffs, the value of the *Anders Knape* was stated to be 2335*l*.

It appeared from the proceedings in the Court below that the master of the *Faith* was called as a witness for the plaintiffs, and gave evidence that on the morning of the 14th of February, between 7 and 8, he and five others, forming the crew of the *Faith*, were in the *Faith* near to the Long Sand buoy. The weather was very hazy, and between 12 and 1 they fell in with a steamship having a flag hoisted for a pilot, which proved to be the *Anders Knape*. The master of the *Anders Knape* hailed the smack, and the master of the smack went alongside. The following is the account given by the master of the smack of what then took place:—

I said, "Captain, what do you want?" He said, "Come up." I went on deck and after I went on deck he said, "Are you a pilot?" I said, "No, I am not a pilot." He says, "Can you take charge of my ship?" I says, "Where are you bound to, captain?" He says, "No, no." He would not tell me. He talked, and all he kept saying was, "Are you a pilot?" I repeatedly told him I was not

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a pilot, that he would get no pilots there where we were. It happened so that we stood talking about it for a long time, and I told him if he did not require my assistance I should leave him. And he turned round and took hold of my shoulder, and said, "No, you shall not leave. I want you, and you shall stop," and he refused to let me get into the boat. I considered that he gave me charge then. He says, "You say that you can take my ship to Harwich. Then take her to Harwich." And I did, and I told the man to port the helm. The ship's head was then into the south-west, which was quite contrary to the way we wanted to go to Harwich, and the captain left me then. The ship answered the helm very slowly. There was a fresh wind—what we call a fresh wind. There was a good deal of sea.

The master of the smack added that he piloted the steamship to the entrance of Harwich harbour, and then a Trinity House pilot boarded her and took her into the harbour. The weather at the time was so thick that he could scarcely see three times the length of the vessel.

On cross-examination the witness was asked what flag the smack had exhibited, and he produced the flag which had been flying at the mast-head of the smack (1), and spoke to the following conversation between himself and the master of the *Anders Knape*:

The captain says, "You have got a pilot's flag up?" I said, "No, captain, the vessel is close to you, you can see that is not a pilot flag I am sure."

In answer to the learned judge of the Court below, the witness gave the following answers:—

Mr. Commissioner Kerr: About that flag. Do fishermen use that flag?—We have got only that flag belonging to the vessel.

Why should you use a flag at all?—We use that. I will tell you what we used it for once since I have been in the vessel. It was the fore-part of this winter. There was a schooner standing on the Long Sand. We hoisted that and warned the man off, or he would have gone on and lost her.

Why was it up on this particular morning?—We hoisted that because we see the steamship coming.

Why did you hoist it. It is very like a pilot flag?—We hoisted it to let him know if he wanted any assistance he could have it.

The master of the *Anders Knape* was examined through an interpreter, on behalf of the defendants, and gave, inter alia, the following evidence:—

On the night of the 13th, and the morning of the 14th of February, we got aground, and got off again about three in the morning; and without assistance

(1) The flag was a square flag, red and white, with a small blue border.

anchored in eleven fathoms of water, and waited till daylight. We were making water, but were able to keep under the water by means of our donkey engines. At first I intended to go to Dover, but feared that night might come on before we got there, and put back for Harwich, when I made up my mind to go to Harwich. We had a signal for a pilot. We afterwards saw the fishing smack. The smack had a flag flying. [*The flag produced by the master of the Faith was referred to.*] I cannot say if that was the flag. The flag was white and red. The smacksman came on board. The second mate speaks English. I asked the smacksman if he was a pilot, and he told me that he was a fisherman. Then I asked him if he could pilot me into Harwich, and he answered "Yes." The rudder was not repaired at Harwich, and the steamer afterwards came to London with the rudder in the same state it was in when she went into Harwich. The rudder went a little heavy that was all. We had been near the light-ship and had read the name of the light-ship, "The Kentish Knock," on the side. We knew perfectly well where we were.

The learned judge of the Court below dismissed the action with costs, on the ground that he was satisfied on the facts that the service rendered was pilotage service and nothing else. He also stated that in his opinion the flag which the smack was flying was to all intents and purposes a pilot flag, and that the services were offered and accepted solely as those of a pilot.

From this decision the plaintiffs appealed.

On the 13th of May the appeal was heard.

E. C. Clarkson, appeared for the appellants. The plaintiffs are entitled to be rewarded as salvors. The condition of the *Anders Knape* was one requiring salvage assistance, and the master of the *Faith*, even if he had been a licensed pilot, could not have been compelled to take charge of her for mere pilotage reward. *The Hedwig* (1); *The Bomarsund* (2); *The Æolus* (3); *The Frederick* (4); *The Little Joe.* (5)

Myburgh, for the respondents. The master of the *Anders Knape* had no signals of distress hoisted, but only made the usual signal for a pilot, and required no more than pilotage assistance. The damage to the *Anders Knape* was very slight and she was in no way disabled. The master of the *Faith* really came on board in the capacity of a pilot, and he rendered no services other than pilotage services: *The Columbus* (6); *The Enterprise.* (6) Though

(1) 1 Spks. 23.
(2) Lush. 78.
(3) Law Rep. 4 A. & E. 29.
(4) 1 Wm. Rob. 17.
(5) Lush. 88.
(6) 2 Hagg. 178, n.

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no tender has been made, the respondents have always been prepared to pay a liberal pilotage remuneration.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. This is a case about which I admit I was exceedingly doubtful in the course of the argument. I have referred to the case of *The Frederick* (1) which is cited in the case of *The Æolus* (2), and in which Dr. Lushington said:—

"It has been urged in the argument for the owners that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time, it is to be observed that it is the settled doctrine of this Court that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward. If a pilot being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subject to no censure; and if he did take charge of her he would be entitled to a salvage remuneration."

Now, the facts of the case are these. This foreign vessel the *Anders Knape* had been on the sand, and had sustained some damage to her rudder. She was, therefore, in a condition in which salvage services might be rendered to her. The master of the smack, who is one of the plaintiffs in this case, says that he went on board this vessel, and was told by her captain that the rudder was broken and that the ship had been aground. A considerable quantity of evidence has been produced as to whether the master of the smack contracted as a salvor, or whether he contracted as a pilot. It has been well put by Mr. Myburgh that there are grounds for contending that he contracted to act as a pilot, but the evidence of the captain of the *Anders Knape* is distinctly the other way. He says that the master of the smack told him that he was a fisherman, and that he could conduct the ship into Harwich—that is to say, if he wished it; that he could help him to go into a port of refuge. Supposing nothing had been said; supposing the master of the smack had gone aboard the *Anders Knape* without saying anything at all, and the captain of the *Anders Knape* had said "I want to go to Harwich," and thereupon the master of the smack had proceeded to put the vessel in a right direction, could it be doubted that the master of the smack would have thereby rendered a salvage

(1) 1 Wm. Rob. 17. (2) Law Rep. 4 A. & E. 29.

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service, looking to the state of the ship and looking to the fact that the master of the smack had been asked to take her to Harwich? I am of opinion that the facts of the case are brought within the ruling in the judgment of Dr. Lushington in the case of *The Frederick* (1) to which I have referred. I think that this was a case in which a pilot would have been subject to no censure if he had refused to take charge of this vessel as a pilot, and if he had taken charge of her would have become entitled to a salvage remuneration, unless he had expressly contracted otherwise in the circumstances. Although I admit that the distinction between what is pilotage and what is salvage is a nice one, upon the whole, I am of opinion that a salvage service was rendered in this case, and that some salvage remuneration should be awarded, and I shall award 30*l.* with the usual costs. There will be leave to appeal.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Stokes & Co.*

THE HEBE. (1879. O. 49.)

May 14.

Salvage—Derelict—Quantum of Remuneration.

Salvors having by meritorious services rendered at the risk of their lives salved a derelict vessel, her cargo and freight, valued together at 750*l.*, the Court awarded 360*l.* as salvage remuneration.

THIS was an action of salvage instituted on behalf of the owners, masters, and crews of four fishing smacks and a steam-tug, against the owners of the *Hebe*, and the cargo lately laden therein together with the freight due for the transportation thereof.

The following allegations contained in the statement of claim were admitted by the defendants:—

The *Concord*, *Deerhound*, *Paul*, and *Mary Ann*, are four smacks belonging to the port of Colchester each carrying six hands. Their tonnage according to builder's measurement is as follows: *Concord*, forty tons, *Deerhound*, thirty tons, *Mary Ann*, forty tons, *Paul*, thirty-five tons.

The *Harwich* is a steam-tug belonging to the port of Harwich of sixty horse-power. She was manned by a crew of seven hands.

(1) 1 Wm. Rob. 17.

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On the morning of Friday, the 24th of January, 1879, the four smacks were cruising off the coast of Essex in order to render assistance to vessels in distress. The wind was blowing strong from E.N.E. with snow squalls and there was a very heavy sea.

About 6.30 A.M. those on board the *Concord* saw rockets in the direction of the Heaps Sand, and shortly afterwards in the direction of Clacton-on-Sea. They proceeded towards the sand and got near it about 9 A.M. As they did so, they saw a vessel on the sand and also saw the Clacton-on-Sea Lifeboat with fourteen or fifteen rescued sailors in her. About the same time the *Deerhound* came up. The crews of the two smacks manned the *Concord's* boat with six hands, three from each, and those in the boat pulled towards the lifeboat found that the rescued sailors were the master and crew of the stranded vessel, asked if they should take charge of her, and were requested by her master to do so. The stranded vessel was the *Hebe*, and from the violence of the gale she had lost all her boats.

The *Mary Ann* and *Paul* had now come up. The *Concord's* boat proceeded to try and reach the *Hebe*, but the wind and weather were so violent that they had to return to the smacks. The tide was now about half flood. After waiting an hour three smacks' boats started all doubly manned, six in the leading boat and four in each of the others, keeping close together in case of accident to the leading boat, and with difficulty and danger succeeded in reaching the *Hebe*.

The *Hebe*, which belongs to the port of Bergen in Norway, is a three-masted ship of about 400 tons and was laden with a cargo of deals and battens. Her crew had cut away all her masts before leaving her. They had gone off in such a hurry as to leave many of their clothes on deck. The sea frequently made a clean breach over her and was washing about the loose articles on the deck.

The smacksmen cleared away the ropes and gear, put the clothes of the crew into the round house and got the anchors and chain ready in the event of her coming off. They had great difficulty in preventing their boats from being knocked to pieces against the sides of the *Hebe*.

About 12 noon the *Hebe* began to move, and about 12.30 she floated. One of the hawsers was then got on deck so that she might be taken in tow by one of the smacks, but it was found that the sea was too heavy for towage, and the smacksmen were compelled to let the *Hebe* drift till she got into seven or eight fathoms of water and then bring her up. The *Concord* was sent to Brightlingsea the nearest telegraph station to telegraph to Harwich for a tug.

The other smacks remained by the *Hebe* with ten of the smacksmen on board. The night was a rough and dangerous one. The smacksmen had only one boat with them which they had during the night to haul on to the *Hebe's* deck and lash to the rail. They also lighted and fixed two anchor lights.

About 9 A.M. of Saturday, the 25th, the *Harwich* which had started after receiving the telegram came up. The weather had somewhat moderated, and the smacksmen on board the *Hebe* were able to get the anchor. About 11 A.M. the *Harwich* began to tow, the *Deerhound* being made fast astern with two hawsers in order to steer her as she could not otherwise have been navigated, and about 4 P.M. the *Hebe* was brought into Sheerness Harbour, safely anchored with two anchors, and delivered to the receiver of wreck. The plaintiffs at the same time specially delivered to the receiver a chronometer, a quadrant, three gold chains, and some other articles found on board the *Hebe*.

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The *Hebe* was a derelict when the plaintiffs first went on board her, and neither the master nor any of the crew of the *Hebe* ever returned to her while the aforesaid services were being performed.

At the hearing it appeared that the *Hebe,* at the time she was stranded, was on a voyage with cargo from Norway to London, and it was agreed that the value of the *Hebe,* her cargo and freight should, for the purposes of the action, be taken to be 750*l.*

W. G. F. Phillimore, for the plaintiffs.
J. P. Aspinall, for the defendants.

SIR ROBERT PHILLIMORE. This is a very meritorious salvage service. There is no reasonable doubt that but for the promptitude and courage of the salvors the vessel and her cargo would have been entirely lost, and they ought to receive a very large reward. Unfortunately the value of the property salved is only 750*l.* I shall award to the salvors 360*l.* together with costs.

Solicitors for plaintiffs: *Goody & Stock.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

[IN THE COURT OF APPEAL.]

July 15

THE BYWELL CASTLE. (1878. L. 256.)

LONDON STEAMBOAT COMPANY *v.* BYWELL CASTLE (OWNERS OF).

Ship—Navigation—Collision—Porting—Wrong Manœuvre—Extreme Danger.

It is wrong to port the helm when a collision is apprehended and the other ship is on the starboard bow.

But where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind.

THIS was an appeal from a judgment of the Court of Admiralty finding both ships to blame for a collision between them.

The *Bywell Castle,* a screw steamer of 891 tons register, was after dark on the evening of the 3rd of September, 1878, coming down Galleons Reach in the Thames with tide, keeping in or to the north of the middle of the stream, and, according to her case,

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she did not alter her course, or altered it very slightly, until immediately before the collision, when she stopped and ported her helm.

The *Princess Alice*, a paddle-wheel steamer of 158 tons register and 220 feet long, had come up the river under the south shore till near Tripcock's Point. She then, according to her case, starboarded her helm so as to keep close to but clear a powder hulk which was moored just above Tripcock's Point, and then cross to Bull Point on the north shore, when she was struck on the starboard bow by the *Bywell Castle*, in consequence of the porting of the helm of the *Bywell Castle*. According to the case of the *Bywell Castle*, the *Princess Alice* went over from Tripcock's Point towards the north shore beyond midstream, then starboarded her helm in order to go up Galleons Reach, and continued under a starboard helm so as to come round and under the bows of the *Bywell Castle*. The *Princess Alice* was struck on the starboard bow and soon afterwards sank. More than 500 of her passengers and many of the crew, including the captain, were drowned. The other material facts of the case are stated in the judgments given below.

An action was brought by the London Steamboat Company, owners of the *Princess Alice*, against the owners of the *Bywell Castle*, and there was a counter-claim by the owners of the *Bywell Castle*.

The action was tried before Sir R. Phillimore and two Elder Brethren of the Trinity House.

Dec. 11, 1878. *R. E. Webster*, *Q.C.*, *Phillimore*, and *Stubbs*, for the *Princess Alice*.

Butt, *Q.C.*, *Clarkson*, and *Myburgh*, for the *Bywell Castle*.

SIR R. PHILLIMORE, after stating the facts of the case and the result of the evidence: It appears to us that when the *Princess Alice* was on a parallel course with the *Bywell Castle*, red light to red light, if their respective courses had been continued, they would have passed at a safe distance from each other; but when a very short distance, variously stated at from 100 to 400 yards, intervened between the two vessels, the master of the *Princess*

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Alice ordered the helm to be put hard-a-starboard, by which he brought his vessel athwart the bows of the *Bywell Castle*, and this fearful collision ensued. The captain of the *Princess Alice* having been unfortunately among the number of those who were drowned, it is impossible to ascertain the motive which induced him to give this order, but I may say that the Elder Brethren strongly incline to the belief that he was misled by seeing the green light of the tug *Enterprise*. There is, however, no trustworthy evidence on this point. It appears to us, moreover, that the *Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations respecting look-out and speed. In our opinion the *Princess Alice* is to blame for this collision. It remains to be considered whether the *Bywell Castle* in any way contributed to it. She appears to have been navigated with due care and skill till within a very short time of the collision. But the evidence certainly establishes that having seen the green light of the *Princess Alice*, she hard a-ported into it. There is no doubt that this was not only obviously a wrong manœuvre, but the worst which she could have executed. The only defence offered for it is that it was executed so very short a time before the collision. There have been several cases decided in this Court, in which it has been holden that a wrong manœuvre taken at the last moment had really no effect upon the collision, on account of the proximity of the two vessels, and I have consulted anxiously with the Elder Brethren whether the wrong action of the *Bywell Castle* can be placed in this category. They are of opinion that if the obviously wrong order of hard a-porting had not been given and obeyed, though the *Princess Alice* might have received some injury, she would not have sunk, and the lives of her crew and passengers would probably have been saved. I am bound, therefore, to pronounce both vessels to blame for this collision.

Damage to be paid for by the vessels equally.

The owners of the *Bywell Castle* appealed, and the appeal was argued before James, Brett, and Cotton, L.JJ., assisted by two nautical assessors.

Butt, Q.C., Clarkson, and *Myburgh,* for the *Bywell Castle.*

R. E. Webster, Q.C., and *Phillimore,* for the *Princess Alice.*

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JAMES, L.J. Upon the point which is first to be considered, namely, whether the *Princess Alice* was in fault or not, we have the direct finding of the Judge of the Court of Admiralty, and of the Trinity Masters who assisted him, they finding in distinct terms that the *Princess Alice* was once in a parallel course with the *Bywell Castle*, red light to red light, and that if their respective courses had been continued they would have passed at a safe distance from each other; but that when a very short distance, variously stated at from 100 to 400 yards, intervened between the two vessels, the master of the *Princess Alice* ordered the helm to be put a-starboard, by which he brought his vessel athwart the bows of the *Bywell Castle*. That was the finding of the judge and the Trinity Masters, who heard all the evidence, and all the comments made, and many of the defences that have been suggested to us on the evidence. They came to that conclusion, and it would require a great deal to satisfy me, that we, sitting as a Court of Appeal, could, on any considerations suggested to us, overrule that finding. My own opinion, moreover, is that the evidence is in support of it. Then with regard to the general conduct of the *Princess Alice*—on which I have not heard a comment made in support of her—the Court says, "It appears to us, moreover, that the *Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations respecting look-out and speed." That is not to be questioned. Therefore, upon the first issue, whether the *Princess Alice* was to blame, there can be no doubt that we must affirm the judgment of the Court below. The judge of the Court below then says that the *Bywell Castle* "appears to have been navigated with due care and skill till within a very short time of the collision," and I understand our assessors to agree with those in the Court below, that all the manœuvres of the *Bywell Castle* up to the time of the collision were executed with due care and skill. Then there comes the very last thing that occurred on the part of the *Bywell Castle*, which is that she, in the very agony, just at the time when the two ships were close together, hard a-ported. The judge and both of the Trinity Masters were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that conclusion, but they advise us that it could not, in their opinion, have had the

slightest appreciable effect upon the collision. That view, if adopted by us, and I think that it should be adopted, would be sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men. I am therefore of opinion that the finding of the Court below, that the *Bywell Castle* was, for the purposes of the suit, to be considered to blame, must be overruled, and that the *Princess Alice* was alone to blame.

BRETT, L.J. In this case the Admiralty Court has found that both ships were to blame, and there are, practically, cross appeals. The judgment of the Admiralty Court is made to depend on four principal findings, some of which are findings of fact, and the others are judicial opinions as to the manœuvres which were employed or ought to have been employed. The four principal findings seem to be these: First, that at one moment these ships had come on to courses which might be called parallel courses, red light to red light, so that if the respective courses had been continued they would have passed at a safe distance from each other. That is a finding in favour of the *Bywell Castle*. The appeal of the *Princess Alice* is practically against that finding. The next principal finding is that the *Princess Alice* was going at full speed, and that the *Bywell Castle* was going at something like half speed. The third finding is that the *Bywell Castle*, up to a very short time before the collision—which, taken in conjunction with the evidence and the first finding, seems to mean, up to the time of putting her helm hard a-port—was navigated with due care and skill. That is a finding in favour of the *Bywell Castle*, which is challenged by the appeal of the *Princess Alice*. The

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fourth finding is that though up to that moment the *Bywell Castle* was right, and although the red light of the *Princess Alice* had been on her port bow, she did wrong in ordering her helm hard a-port. That is the finding against the *Bywell Castle.*

Now, having in the judgment of the Admiralty Court four distinct findings, we are asked to review them; but we ought not, in accordance with the rules that govern the Court of Appeal, to overrule any one of these findings unless we are convinced that it was wrong. Therefore, applying that rule to the findings which are in favour of the *Bywell Castle,* we must consider whether we can say that the Admiralty Court was wrong in holding that at some particular moment these vessels were on parallel courses, red light to red light, and that up to the time of the order being given to put the helm hard a-port the *Bywell Castle* had been navigated with due care and skill. So far from being able to say that the Court was wrong, it seems, on the balance of evidence, tested by the probabilities of the case, that the findings were right. But there was this suggestion—very well put by Dr. Phillimore in the course of the argument—that both ships were going round Tripcock's Point on the south shore of the river in parallel circles, and he said that a vessel going up the river on the ebb tide may pass on the inner circle when coming round such a point; and if she did so the other vessel ought to keep on the outer circle, the one coming up the stream on the southern circle, and the other going down the northern circle. If so, at the first moment of sighting each other, the ship coming up the river would shew her red light, but not as she came round the circle; it is obvious that she would then shew her green light, and then they ought to pass starboard side to starboard side. But there is another course which a vessel coming up the river and approaching such a point may take if she wishes to cheat the tide; she can go, not as has been said, on a straight course to the other side without turning up into the next reach, but she can come round the point with a slightly starboard helm so as to take her across to the north side of the reach, not coming in a straight line to the next point, but nearer to the north shore, and so cheat the tide. Now, that she may do, and not only is that what she may do, but, on the whole, with ebb tide, it is more than probable that that is

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what she would do. With regard to a vessel going down such a reach, the course will be to go as near as possible down the centre of the stream; and if no other vessel is coming up, she will not port her helm, but will round Tripcock's Point, keeping out in the tide, and therefore, when going down Galleons Reach, she will, for her own advantage, not port her helm at all. Those being the probabilities, we have the evidence here on the one side and on the other. No doubt the *Princess Alice* did come close round Tripcock's Point, and her case is that she did take, or intend to take, a course which is not improbable, coming close round the magazine, and keeping on the south side; and that, under those circumstances, she did shew her green light to the *Bywell Castle* on the starboard bow and that the *Bywell Castle* shewed her green light as she was coming down. But the evidence on the other side is, that the *Princess Alice* came close to Tripcock's Point, but did not straighten herself up the river, so as to run by the powder magazine; and that when she passed by the stern of it she was going directly towards the north side. She would, therefore, and did shew her red light to the *Bywell Castle* before coming up to the point, and after clearing the point, and after clearing the powder magazine, so that finally it came ahead of the *Bywell Castle*. That is what the *Bywell Castle* says did happen—that the red light drew across the river to the north side, and came a-head of her. That would, it seems to me, fully indicate to the *Bywell Castle* that the *Princess Alice* was going a course which would take her across to the north side, and this is an answer to the argument that the *Bywell Castle* ported without having any regard to the *Princess Alice*. That is a very unlikely thing for her to do, but if she saw this red light passing on until it came a-head of her it is not unnatural that she should slightly port her helm. It seems a natural and proper thing to do that which she says she did, and for the reason which she gives, there being no reason why she should do that for any other purpose. Therefore the argument that she executed a wrong manœuvre fails. I agree with the finding that it was not wrong. Then the *Princess Alice* would naturally keep on her course until she got more to the north, as it is said she did. It has been argued if she was then under a starboard helm, though she got on to the port bow of the

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Bywell Castle, that the *Bywell Castle* nevertheless ought to have starboarded or kept straight down the reach. It seems to me that that is to propound a most dangerous rule, that if vessels are coming round a point, one under a starboard helm, if she crosses so that her red light is on the port bow of the other, she shall have a right to keep her helm to starboard. It seems to me that the rule that both ships ought to pass port side to port side applies, and it would be dangerous to hold the contrary. It was the duty of the *Princess Alice*, if under a starboard helm, to ease off at once so as to pass port side to port side. According to the evidence and to the argument before us she did not do that. It seems to me that not only could I not legally say that the finding of the Court below was wrong, but, taking the evidence and the probabilities, I should have decided in the same way, that the red light of the *Princess Alice* had got on the port side of the *Bywell Castle*, and that it was her duty to ease off. I cannot indeed have a doubt that the *Princess Alice* was in the wrong. She was in the wrong for not keeping on the port side of the *Bywell Castle*, having once got there, and she was also in the wrong in going at the time at full speed; therefore she was twice in the wrong. Then, if that be so, of course she was still more wrong if, instead of easing her starboard helm, she kept on that helm, and if she did ease, she was still more wrong in putting the helm again to starboard. If she was on the port side of the *Bywell Castle*, by her wrong act she put the *Bywell Castle's* captain into an extreme difficulty, in being close to him shewing him a green light on his port bow. The next question is whether the *Bywell Castle* being put into that difficulty did what was wrong. It is said that she did so in two instances. But what is the wrong that the Court is bound to find she did? Not merely that she did a wrong thing, but that she was guilty of a want of that care or skill which she ought to have shewn under such difficult circumstances. I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to shew such skill as persons of their position with ordinary nerve ought to shew under the circumstances. But any Court ought to make the very

greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind, enabling him to do the best thing possible. What the pilot did was to give the orders to stop and to put the helm hard a-port; and the order to stop was carried out. He says that he gave the order not only to stop, but to reverse. I agree that if he had time to do it he ought to have done it. There was some dispute as to who did give the order, and it is said that if he did give the order it was not obeyed. But whichever order was given we must consider the circumstances. He was not called upon to give the order to stop and reverse until the other ship had done the wrong thing. Where did she do it? She did it close to him, and the first order was to stop or to stop and reverse, the next to put the helm a-port. Whichever it was, the Court has not found that there was any wrong order as to the stopping or reversing, though it has found that the order to port was wrong. We are, however, advised that the order to put the helm hard a-port had no practical effect as to the collision. If that be so, of course it follows that the last wrongful act of the *Princess Alice* was done so near to the other that it was impossible by any manœuvre to avoid the collision. If the fact of ordering the helm hard a-port had no effect upon the collision, it is immaterial whether it was given or not. Even if it had an effect and was wrong, we have come to the conclusion that the captain of the *Bywell Castle* was suddenly put into an extremely difficult position, and assuming that a wrong order was given, that it ought not under the circumstances to be attributed to him as a thing done with such want of nerve and skill as entitles us to say that by negligence and want of skill the *Bywell Castle* contributed to the accident. Therefore, though agreeing with all the other findings as to the *Princess Alice*, we must come to a different opinion as to the last finding, the result of which is that we must hold the *Princess Alice* solely to blame.

COTTON, L.J. After the very full way in which Brett, L.J., has entered into the case it is unnecessary for me to say more than that I have come to the same conclusion, but I wish to add

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a few words. There are in this case two questions to consider. First, was the Judge of the Court below right in finding that the *Princess Alice* was in fault? We here are only dealing with the evidence which was brought before the Judge of the Court below, who had the benefit of seeing and hearing the witnesses. We have not had that opportunity of testing the evidence; and that in this case is of very considerable importance, because a great deal of the argument on behalf of the *Princess Alice* consisted in commenting on alleged discrepancies in the evidence of the witnesses for the *Bywell Castle*, and asking us practically to discredit their evidence. In such a case, in order to overrule the finding of a Judge of the Court below, we ought to be satisfied that his finding cannot upon the evidence be sustained. This in the present case I cannot say, because on the evidence which we have heard I should have arrived at the same conclusion as the learned Judge of the Court below. [His Lordship then commented on the evidence, and concluded that he agreed with what in substance was the evidence on behalf of the *Bywell Castle*, that the *Princess Alice* going over to the point on the north shore had got on the port bow of the *Bywell Castle*, and that she did alter her course by starboarding and hard a-starboarding her helm.] On the other point, that the *Bywell Castle* did not contribute to the accident, by hard a-porting before the collision, I agree with the view expressed by Brett, L.J. Our assessors tell us that it could not in any way have been contributory to the accident, which in their opinion was then inevitable. Even if the collision had not been unavoidable at the time when the helm of the *Bywell Castle* was put hard a-port, I should not have held that vessel liable. For in my opinion the sound rule is, that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best. In this case, though to put the helm of the *Bywell Castle* hard a-port was not in fact the best thing to be

done, I cannot hold that to do so was under the circumstances an act of negligence on the part of those who had charge of that vessel.

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Judgment for the Bywell Castle.

Cotton, L.J.

Solicitors for *Bywell Castle: Newman, Stretton, & Hilliard.*
Solicitors for *Princess Alice: T. Cooper & Co.*

IN THE GOODS OF TEODORO UZUAGA Y FERNANDEZ, DECEASED.

March 3, 18.

Administration—Bond—Sureties abroad.

Administration bond allowed to be executed by foreigners resident abroad, upon proof that the administrator was unable to obtain sureties resident here, that the deceased had no debts unpaid, and that the person on whose behalf the letters of administration were applied for was solely entitled to the estate in this country.

THE deceased, by his will, dated the 30th of July, 1861, appointed his brother sole executor and universal legatee, who died in the testator's lifetime. The deceased died on the 27th of July, 1873, a bachelor, without parents, leaving a sister his sole next of kin.

The deceased was a native of Cuba, and died domiciled there, and his sister, who was also a native of Cuba, and domiciled and resident there, had, by power of attorney, appointed Alezo Uzuaga to collect the property of the deceased in this country, which consisted of 5957*l.* 11*s.* 4*d.* on deposit account in the Bank of England.

Alezo Uzuaga was also a foreigner, and unable to obtain two sureties resident in England.

Searle, moved the Court to allow the administration bond to be executed by two friends of the applicant resident in Paris. The affidavits shew that the applicant is unable to obtain sureties resident here, and that the sister is by decree of the proper Court at Cuba solely entitled to the money, and there is an opinion of a French advocate that the sureties might if necessary be sued in France on the bond: *In the Goods of Reed* (1); *In the Goods of Houston.* (2)

(1) 3 S. & T. 439.

(2) Law Rep. 1 P. & D. 85.

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The Court refused the application.

Searle, again moved the Court upon an affidavit shewing also that all the deceased's debts in Cuba had been paid, and that there were no debts in this country.

SIR J. HANNEN. I think the case of *In the Goods of Houston* (1) is now a direct authority. I can make no distinction between that case and this, and must therefore grant the application. But the sureties must justify.

Solicitors: *Druce, Sons, & Jackson.*

May 16.

THE QUEEN'S PROCTOR *v.* FRY.

Baptisms in India—Evidence.

In an action to determine the right to letters of administration, the issue being as to the legitimacy of certain persons, copies of registers of baptisms in India were admitted in evidence.

THIS was an action to obtain revocation of a grant of letters of administration, and another grant to the Crown, on the ground that the deceased had died intestate and without any known relations. The issues in the action were whether Miss Ceta Howard and Miss Jessie Howard were the legitimate children of Sir Simon Howard.

Bowen (*The Attorney General*, with him), for the Crown, tendered in evidence copies of entries of baptisms in India. The original registers are in India, but the copies tendered have been transmitted to the India Office and are deposited there. The question has been decided as to entries of marriages: *Ratcliff* v. *Ratcliff and Anderson* (2); *The Peerless.* (3)

Dr. Spinks (*H. D. Greene*, with him), for the defendant, contended that there was a distinction in this respect between the records of marriages and baptisms.

SIR J. HANNEN. I am of opinion that there is no distinction between the two classes of documents. Both are kept by order of the Government of India, and the same public reasons which

(1) Law Rep. 1 P. & D. 85. (2) 1 S. & T. 467. (3) 1 Lush. 42.

render it desirable that the one should be kept apply equally to the other. 1879

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The documents were admitted accordingly.

Solicitor for plaintiff: *The Queen's Proctor.*

Solicitors for defendant: *Vallance & Vallance.*

Applied. *Re* HOWLETT (*decd.*). [1950] 1 All E.R. 485. *Considered.* *Re* HOWLETT, DECD. [1950] P. 177

FISHER AND JOY *v.* FISHER AND OTHERS, INTERVENERS. 1878

Taxation—Administrator pending Suit—Costs. *Jan.* 15.

In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit.

THIS was an action of probate of a will. The defendant and interveners were condemned in costs. An administrator had been appointed pending suit, and upon the taxation of costs the registrar allowed the administrator the costs of obtaining the order for the appointment, but disallowed the charges of obtaining the grant and passing the accounts, and the amount of the administrator's remuneration, on the ground that it had been the practice to allow the administrator to deduct these charges before paying over the balance in his hands.

A summons was issued for a review of the taxation so as to include these costs, it being contended that they were properly costs in the cause, and ought to be recovered from the defendant or interveners, and not deducted from the balance due to the plaintiffs.

Searle, contrà.

PER CURIAM. The appointment of an administrator pendente lite was a proceeding in the cause rendered necessary by the litigation; the unsuccessful party must therefore bear the additional costs which have thereby been occasioned to the estate.

Application granted. (1)

Solicitors for plaintiffs: *Nash & Field.*

Solicitors for defendants: *Lovell, Son, & Pitfield.*

(1) The order was as follows:—That it be referred to the registrar to consider what additional costs were occasioned to the estate by the appointment of the administrator pending suit, and to allow such additional costs.

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April 29.

MANSEL *v.* THE ATTORNEY-GENERAL.

Legitimacy — Pleadings—Amendment — Jurisdiction — Citation to see Proceedings—Legitimacy Declaration Act (21 & 22 *Vict. c.* 93).

In a petition under the Legitimacy Declaration Act the petitioner may allege that he claims real estate, and may also state how he claims it, but he cannot allege, or pray for a declaration, that he is entitled to such estate to the exclusion of some other person, e.g., by reason of the illegitimacy of the person.

A petitioner alleged that he claimed real estate as heir-at-law of his father, and that E. B. M. also claimed to be such heir-at-law. Leave to cite E. B. M. was refused on the ground that E. B. M. was not interested in disputing the only facts which the Court was competent to determine, i.e., the legitimacy of the petitioner or the marriage of his parents.

The Court has power to amend the pleadings at any time, and, if necessary, to order allegations to be reinserted which it had previously directed to be struck out.

THIS petition under the Legitimacy Declaration Act (21 & 22 Vict. c. 93), having been amended according to the order of the Court (1),

Jan. 29, 1878. *Dr. Deane, Q.C.*, and *Dr. Tristram*, for the petitioner, moved for leave to issue a citation against Edward Berkeley Mansel, on the ground that if the said Edward Berkeley Mansel were the legitimate son and heir-at-law of his father, he might become entitled under certain limitations in the will of his father, to real estate in England, whereas if the petitioner were the eldest lawful son and the heir-at-law of his father, the petitioner would be entitled to such estate under those limitations.

[THE PRESIDENT. The petitioner is endeavouring to obtain a decision on the question whether he is entitled to the baronetcy. (2) How does it appear upon the petition as it now stands, that there is any ground for citing Edward Berkeley Mansel?]

Those parts of the petition which set out the will of the father and the ultimate remainder to the use of his right heirs have been struck out.

Dr. Tristram. It is desired to cite Edward B. Mansel, as interested in the real estate, and the petitioner relies on *Shedden* v. *Attorney General and Patrick* (3), where persons were cited who

(1) 2 P. D. 265. (2) See *Frederick* v. *The Attorney General*, 3 P. & M. 196.
(3) 2 Sw. & Tr. 170.

were interested in disputing the validity of the marriage alleged by the petitioners. The case is not reported on that point, but according to a short-hand writer's notes of the discussion before the full Court the citation was ordered to issue. The Court has to decide whether the marriage alleged by the petitioners is or is not a valid marriage, and all persons who may have an interest in that question should be cited.

A. E. Hardy, for the Attorney General. The statute gives the Court a discretion to issue or to withhold a citation. Edward Berkeley Mansel is not and cannot be interested in denying either the validity of the marriage of his parents or the legitimacy of the petitioner, and these are the only facts which can be established by the decree prayed for in the petition. It can only be desired to cite Edward Berkeley Mansel for the purpose of bastardising him, but such a proceeding is not contemplated by the statute.

[THE PRESIDENT. I shall not allow the elder brother to be cited for the purpose of raising the question whether or not he is a bastard. But I am in considerable doubt whether I was right in striking out of the petition the allegations relating to Edward Berkeley Mansel's interest in the real estate. If a natural-born subject of the Queen claims real or personal estate in England, such claim gives him a locus standi to pray for a decree establishing his legitimacy, although the Court has no power to make a declaration as to the right of any person to real or personal estate. Ought not a person who is a claimant of real estate to be cited, although the issuing of such citation may have the incidental effect of establishing his bastardy?]

The person to be cited has no interest in disputing the prayer of the petition.

THE PRESIDENT. I am of opinion that this application must be considered with reference to the petition as it now stands. I did undoubtedly order certain passages in the petition to be struck out when the case was before me on a previous occasion, on the ground that these passages were introduced for the purpose of raising a collateral question, and one which I considered it was not within the jurisdiction of the Court to determine, namely, whether the elder brother was legitimate or illegitimate, the object of the petitioner

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being to establish that he was illegitimate. I think it right to state that I am by no means free from doubt whether I did not order too much to be struck out. It may be argued that by striking out some of the passages, I have deprived the petitioner of the opportunity of shewing that he comes within the description of one of the classes of persons entitled to take these proceedings, namely, a natural-born subject of the Queen claiming real estate in England. If I was in error I can be set right either by an application to myself or to the full Court. But dealing with this application on the basis of the petition in its present form, I think I ought not, in the exercise of my discretion, to allow the elder brother to be cited. It does not appear on the face of the petition that there is any claim made by the petitioner to any real estate in England, and it is obvious that the elder brother has no interest in disputing the younger brother's legitimacy. I shall not, therefore, allow the elder brother to be bound incidentally by a declaration that a marriage between his parents, celebrated at a particular date subsequent to his birth, was a valid marriage. The application is rejected.

Feb. 12, 1878. *Dr. Deane, Q.C.*, and *Dr. Tristram*, applied on behalf of the petitioner to amend the petition by inserting after the 6th paragraph thereof (1) the following further paragaphs:—

7. Your petitioner's said father, by his last will and testament dated the 22nd day of March, 1875, devised all his manors, messuages, farms, lands, tenements, and hereditaments in the counties of Glamorgan, Carmarthen, Surrey, and elsewhere, of and to which he should at his death be seized or entitled in possession, remainder, or reversion, subject to a certain annuity and to certain charges, to the use of your petitioner for life, with remainder to the use of the first and every other son of your petitioner successively, according to their respective seniorities in tail male, and subject thereto to the use of all the daughters of the testator as tenants in common in tail, with cross remainders between them, and subject thereto to the use of an only daughter in tail, and subject thereto to the use of the testator's own right heirs.

8. On the 9th day of March, 1877, the President of the Probate,

(1) 2 P. D. 269.

Divorce, and Admiralty Division of this Court, after the trial before the said President and a special jury as to the validity of the said will, and after a verdict had been returned in favour of the said will, pronounced for the validity of the same, and decreed probate thereof in solemn form of law, and such probate is binding on the real estate disposed of by the said will.

9. By the aforesaid provisions of the said will your petitioner in certain contingencies, that is to say, in the event of the said limitations contained in the said will in favour of his issue male lawfully begotten, and of the said daughters of the testator, failing to take effect, will be entitled to the ultimate remainder over of the said real estates, as the heir-at-law of the said Courtenay Mansel (the elder).

10. Edward Berkley Mansel, of Brandon Hall, near Ipswich, in the county of Suffolk, Esquire, late a captain in the 6th Dragoon Guards, *being a son of the said Courtenay Mansel, the father by the said Eliza Mansel, but who was born prior to the celebration of the said marriage of the said 7th day of June,* 1847, *has claimed to be the lawful son and heir-at-law of the said Courtenay Mansel (the father) as the issue of an alleged previous marriage, pretended to have been contracted in Scotland between the said Courtenay Mansel (the father) and the said Eliza Sidney.* (1)

It was also proposed to amend the prayer of the petition by inserting in the 2nd paragraph, after the word "petitioner" the words "being issue of the aforesaid marriage," and by striking out the word "lawful" in the same 2nd paragraph, and substituting the word "legitimate." (2)

A. E. Hardy, for the Attorney General. The Court has no jurisdiction to order these paragraphs to be re-inserted in the petition.

(1) The paragraphs 7, 8, and 9 are the same as those previously ordered to be struck out, except that instead of the words in italics the following were inserted, "and who is a son of the said Courtenay Mansel, the father by the said Eliza Mansel (who before her said marriage passed for some years as Eliza Knighton), having been born out of wedlock, alleges that he is the legitimate son and heir-at-law of your petitioner's said father the said Courtenay Mansel the elder."

(2) The 2nd paragraph of the prayer would then be as follows, viz. "That your petitioner being issue of the aforesaid marriage is the lawful son of the said Courtenay Phillips, afterwards Courtenay Mansel the elder, and Eliza his wife, and is the legitimate heir-at-law of the said Courtenay Mansel the elder.

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The amendment ought not to be allowed, because it proposes to put in issue certain facts when the finding upon that issue cannot have effect given to it by a decree of the Court. The object of the amendment is to have a certain person cited who appears on the face of the amendment to be the son of the same parents as the petitioner. That is decisive against allowing the amendment and against issuing the citation.

Dr. Deane, Q.C. The petitioner is entitled to have the question of the validity of his parents' marriage decided by the Court; and the substantial question is, whether a marriage celebrated at a certain date is a valid marriage. It is impossible to raise that question without setting out on the face of the petition the facts alleged in the proposed amendment. It is proposed to cite Edward Berkeley Mansel, not as next of kin or as heir-at-law, but in order to bind him.

THE PRESIDENT. The question is whether it is right to insert in the petition an allegation that some person other than the petitioner is illegitimate. If the petitioner claims real property, any person having an interest in that real property would be a proper person to cite; but is not the proposed allegation irrelevant and unnecessary?

Cur. adv. vult.

Feb. 19, 1878. THE PRESIDENT. In this case, at the instance of Mr. Hardy, I ordered certain passages to be struck out of the petition as it was originally drawn. Application was afterwards made to me in effect to reconsider my judgment, and to restore those passages to the petition. I have come to the conclusion that I did strike out of the petition more than I was justified in doing.

The first ground on which Mr. Hardy opposed this application was, that the Court having given its decision its functions were at an end, and the only remedy of the petitioner was an application to the Court of Appeal. But I am of opinion that the matter is not to be considered as res judicata. It is merely a question with reference to pleadings, and the Court has a discretionary power to amend the pleadings in a suit at any time, so as to bring to an issue the matters which are really and substantially in litigation

between the parties. I think, therefore, that I have power to allow any alteration I think proper to be made in the pleadings.

As to restoring the several passages which I ordered to be struck out on the previous occasion I agree, in the main, with the opinion I then expressed. For instance, as to paragraph 10, which does not relate merely to the petitioner's legitimacy, but which concerns the illegitimacy of another person, I remain of the opinion that it is improper and must still be excluded from the petition. But I think the 8th and 9th paragraphs ought to be restored with a slight modification. The effect of these paragraphs is to shew in what way the petitioner claims real estate in England. That is one of the conditions necessary to give the Court jurisdiction in the matter, and the petitioner is bound to show how he claims real estate in England. Mr. Hardy suggested that it would be sufficient if he simply stated his claim in so many words; and I quite agree that a statement in that form would be legally sufficient, but I think it would not be the proper form. I think it right that the petitioner should shew in what way the real estate is claimed. This is necessary in order to shew that the proceedings are taken bonâ fide by the petitioner with a view to establish such a claim, and if the statement had been in the general terms suggested, the Attorney General would have been justified in calling on the petitioners to give particulars. This appears to me to be the effect of the 7th, 8th, and 9th paragraphs, and they must therefore be restored.

It was further argued by Mr. Hardy that the Attorney General ought not to be called on to litigate matters which are not the proper subjects of proceedings under the Legitimacy Declaration Act, and that this would be the effect of allowing the 7th, 8th, and 9th paragraphs. That argument is well founded to the extent that it ought not to be a specific question on the record, whether or not the petitioner is entitled to the ultimate remainder over of real estate. It is sufficient, if it appears, that there is a bonâ fide claimant of real estate. The 7th and 8th paragraphs, which merely set out the terms of the will, and the verdict and decision in the Probate cause call for no remark, and give rise to no substantial difficulty. But the 9th paragraph does give rise to a difficulty, because it alleges specifically as a fact

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that the petitioner will be entitled to an ultimate remainder over of real estate as heir-at-law. I think that is wrong in form. The proper form is to put it merely as a claim by the petitioner, and should run thus: "By the aforesaid provisions, &c., your petitioner in certain events, &c., *claims to be entitled* to the ultimate remainder over," &c.

The 10th paragraph remains struck out, but I restore the 7th, 8th, and 9th paragraphs, with the alterations in the 9th which I have mentioned.

Dr. Deane, Q.C. Enquired as to the citation.

THE PRESIDENT. The question of the citation is not at present before me.

July 23, 1878. The petition having been amended by the reinsertion of paragraphs 7, 8, and 9, with the alteration in the 9th paragraph suggested by the president, and the prayer of the petition having been also amended by inserting in the 2nd paragraph, after the word "petitioner," the words "being issue of the aforesaid marriage," and by striking out the word "lawful" and substituting the word "legitimate"—

Dr. Deane, Q.C. (with him, *Dr. Tristram*), for the petitioner, renewed the motion for leave to cite Edward Berkeley Mansel. The petitioner in his affidavit filed in support of the application further deposed, amongst other things, as follows:—

"Edward Berkeley Mansel has asserted a claim to be the heir-at-law of the said testator (petitioner's father), and I say that I am desirous that the said Edward Berkeley Mansel may be cited in these proceedings in respect of any alleged claim he may have to the ultimate remainder over to the said real estate devised by the said will, in order that the decree of this Court made on this petition may be valid and binding on him and on any party deriving title under or through him to all intents and purposes whatsoever, as declared by the said Legitimacy Declaration Act, 1858.

"My said claim to the ultimate remainder over to the said real estate is a bonâ fide claim, and I make this application for the said Edward Berkeley Mansel to be cited bonâ fide."

A. E. Hardy, for the Attorney General, contrà.

THE PRESIDENT. This is an application to me to exercise the powers given by the 7th section of the Legitimacy Declaration Act to order that "such person or persons (if any) besides the Attorney General, as the Court shall think fit, shall be cited to see proceedings or otherwise summoned in such manner as the Court shall direct," and the question is, whether I ought, in the exercise of my discretion, to deem it fit that Mr. Edward Berkeley Mansel should be cited? That must depend upon whether I think he has an interest, or a possible interest, in disputing any of the facts which this Court is competent to determine.

The object of the Act is shewn in almost every part of it. It is by its title "An Act to enable persons to establish legitimacy and the validity of marriages," and also "the right to be deemed natural-born subjects," and in the preamble it recites that, "Whereas it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended," and that which the Court is empowered to grant is "a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother was a valid marriage," the jurisdiction of the Court being "to determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just." But Edward Berkeley Mansel is not interested in contesting the legitimacy of the petitioner or the validity of the marriage of his parents, and, indeed, from what has appeared when this matter has been before me on other occasions, it is clear that it would be his interest to support the affirmative of both these propositions. It has been contended by Dr. Deane that the Court ought not to be prejudiced by its knowledge or surmise of what are the motives which influence the petitioner in making this application. That is true, and if it appears that the petitioner has the right upon which he is now insisting I should not refuse his application because I thought he had another motive, but the petitioner does not by his affidavit establish that Mr. Edward Berkeley Mansel, whom he desires to cite, is interested in the matters which will be brought before the Court for determination. The petitioner's object is to establish not

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merely his own legitimacy, not merely the validity of the marriage of his parents, but the illegitimacy also of Edward Berkeley Mansel. The clauses which I have read of the Act of Parliament were not intended, as I conceive, to give me any such power. They give me only jurisdiction to determine the legitimacy of the person putting the Court in motion, and, of course, as a necessary incident to his legitimacy, to establish the validity of the marriage of his parents. But it was not intended to cast upon this Court the duty of determining whether other children of the reputed married persons were born before or after wedlock. I reject the application.

Leave to issue citation refused.

From this judgment the petitioner appealed, and the appeal was heard before the full Court (the President and Sir R. J. Phillimore, and Lopes, J.) on the 29th of April, 1879.

Dr. Deane, Q.C. (with him, *Dr. Tristram*), for the petitioner.

A. E. Hardy, for the Attorney General.

SIR R. J. PHILLIMORE. I am of opinion that the judgment of the Court ought not to be disturbed. The question is, whether Edward Berkeley Mansel ought or ought not to be cited? That question is answered by considering whether he has an interest in disputing the legitimacy of the petitioner or the validity of the marriage of his parents. I am of opinion that he has no interest in contesting either, and therefore I think that a proper discretion was exercised by the Court in refusing to allow Edward Berkeley Mansel to be cited for some other purpose.

LOPES, J. I entirely concur in the judgment.

THE PRESIDENT (SIR JAMES HANNEN). I have nothing to add to the judgment which I have given.

Judgment affirmed.

Solicitors for petitioner: *Nelson, Son, & Hastings, for E. Norton, Swansea.*

Solicitor for Attorney General: *E. L. Rowcliffe.*

ORDER IN COUNCIL,

August 14, 1879.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

AT THE COURT AT OSBORNE, ISLE OF WIGHT,

the 14*th day of August*, 1879.

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by "The Merchant Shipping Act Amendment Act, 1862," it was enacted, that on and after the first day of June, one thousand eight hundred and sixty-three, or such later day as might be fixed for the purpose by Order in Council, the Regulations contained in the table marked C in the schedule to the said Act should come into operation and be of the same force as if they were enacted in the body of the said Act; but that Her Majesty might from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annul or modify any of the said Regulations, or make new Regulations in addition thereto or in substitution therefor; and that any alterations in, or additions to, such Regulations made in manner aforesaid should be of the same force as the Regulations in the said schedule:

And whereas, by the same Act, it was further provided, that whenever it should be made to appear to Her Majesty that the Government of any foreign country was willing that the Regula-

tions for preventing Collisions contained in Table C in the schedule to the said Act, or such other Regulations for preventing Collisions as are for the time being in force under the said Act, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty might, by Order in Council, direct that such Regulations should apply to the ships of the said foreign country, whether within British jurisdiction or not; and it was further provided by the said Act, that whenever an Order in Council had been issued applying any Regulation made by or in pursuance of the said Act to the ships of any foreign country, such ships should, in all cases arising in any British court, be deemed to be subject to such Regulation, and should, for the purpose of such Regulation, be treated as if they were British ships:

And whereas, by an Order in Council made in pursuance of the said recited Act, and dated the ninth day of January one thousand eight hundred and sixty-three, Her Majesty was pleased to direct:—First that the Regulations contained in the schedule to the said Act should be modified by the substitution for such Regulations of certain Regulations appended to the said Order:

Secondly, that the said Regulations appended to the said Order should, on and after the first day of June, one thousand eight hundred and sixty-three, apply to French ships, whether within British jurisdiction or not:

And whereas, by several Orders in Council subsequently made, Her Majesty was pleased to direct that the Regulations appended to the said Order of the ninth of January one thousand eight hundred and sixty-three should apply to ships of the countries specified in the said Orders, whether within British jurisdiction or not:

And whereas, by Order in Council, dated the thirtieth day of July one thousand eight hundred and sixty-eight, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to make certain additions to the Regulations appended to the said first-recited Order in Council, for the purpose of explaining Articles 11 and 13 of the said Regulations, and of removing doubt and misapprehension concerning the effect of the said two Articles:

And whereas, the Admiralty and the Board of Trade have jointly recommended to Her Majesty that the Regulations contained in the Order in Council dated the ninth day of January one thousand eight hundred and sixty-three, and the additions to the said Regulations contained in the said Order in Council of the thirtieth day of July one thousand eight hundred and sixty-eight, shall be annulled from the first day of September one thousand eight hundred and eighty, and that there shall be substituted for the said Regulations and additions respectively the new Regulations hereinafter set forth :

And whereas it has been made to appear to Her Majesty, that the governments of the several foreign countries mentioned in the second schedule hereto are respectively willing that the regulations contained in the first schedule hereto shall apply to ships of the said countries respectively whether within British jurisdiction or not :

Now, therefore, Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct :—

First, that on and after the first day of September one thousand eight hundred and eighty the Regulations appended to the said Order in Council of the ninth day of January one thousand eight hundred and sixty-three and the additions to the said Regulations contained in the said Order in Council of the thirtieth day of July one thousand eight hundred and sixty-eight shall be annulled, and that there shall be substituted for the said Regulations and additions respectively the new Regulations contained in the first schedule hereto.

Second, that the said Regulations contained in the said first schedule hereto shall, from and after the first day of September one thousand eight hundred and eighty, apply to ships of the countries mentioned in the said second schedule hereto whether within British jurisdiction or not.

FIRST SCHEDULE.

Regulations for Preventing Collisions at Sea.

Preliminary.

Art. 1. In the following rules every steam ship which is under sail and not under steam is to be considered a sailing ship; and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

Art. 2. The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, 9 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. A seagoing steam ship when under way shall carry:

(*a.*) On or in front of the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet then at a height above the hull not less than such breadth, a bright white light, so constructed as to shew an uniform and unbroken light over an arc of the horizon of 20 points of the compass; so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to two points abaft the beam on either side: and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b.*) On the starboard side, a green light so constructed as to shew an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*c.*) On the port side, a red light, so constructed as to shew an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d.*) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. A steam ship, when towing another ship shall, in addition to her side lights, carry two bright white lights in a vertical line one over

the other, no less than three feet apart, so as to distinguish her from other steam ships. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam ships are required to carry.

Art. 5. A ship, whether a steam ship or a sailing ship, when employed either in laying or in picking up a telegraph cable, or which from any accident is not under command, shall at night carry in the same position as the white light which steam ships are required to carry, and, if a steam ship, in place of that light, three red lights in globular lanterns, each not less than 10 inches in diameter, in a vertical line one over the other, not less than three feet apart: and shall by day carry in a vertical line one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

These shapes and lights are to be taken by approaching ships as signals that the ship using them is not under command, and cannot therefore get out of the way.

The above ships, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steam ship under way, with the exception of the white light, which she shall never carry.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck on their respective sides of the vessel, ready for use: and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 8. A ship, whether a steam ship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to shew a clear uniform and unbroken light visible all round the horizon, at a distance of at least one mile.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a

white light at the mast head, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

Art. 10. (*a.*) Open fishing boats and other open boats when under way shall not be obliged to carry the side lights required for other vessels; but every such boat shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(*b.*) A fishing vessel, and an open boat, when at anchor, shall exhibit a bright white light.

(*c.*) A fishing vessel, when employed in drift net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart.

(*d.*) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or, if the side lights cannot be carried, have ready at hand the coloured lights as provided in Article 7, or a lantern with a red and a green glass as described in paragraph (*a.*) of this Article.

(*e.*) Fishing vessels and open boats shall not be prevented from using a flare-up in addition, if they desire to do so.

(*f.*) The lights mentioned in this Article are substituted for those mentioned in the 12th, 13th, and 14th Articles of the Convention between France and England scheduled to the British Sea Fisheries Act, 1868.

(*g.*) All lights required by this Article, except side lights, shall be in globular lanterns so constructed as to shew all round the horizon.

Art. 11. A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, &c.

Art. 12. A steam ship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog horn to be sounded by bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar fog horn and bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,

(*a.*) A steam ship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(*b.*) A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(*c.*) A steam ship and a sailing ship when not under way shall, at intervals of not more than two minutes, ring the bell.

Speed of Ships to be moderated in Fog, &c.

Art. 13. Every ship, whether a sailing ship or steam ship, shall in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.:—

(*a.*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(*b.*) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(*c.*) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(*d.*) When both are running free with the wind on the same side, the ship which is to the windward shall keep out of the way of the ship which is to leeward.

(*e.*) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to ships which must, if both keep on their respective courses, pass clear of each other.

The only cases in which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or

nearly in a line, with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply by day to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other. (1)

Art. 17. If two ships, one of which is a sailing ship, and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship. (1)

Art. 18. Every steam ship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

Art. 19. In taking any course authorized or required by these Regulations, a steam ship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:—

One short blast to mean "I am directing my course to starboard":
Two short blasts to mean "I am directing my course to port":
Three short blasts to mean "I am going full speed astern."

The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing ship or a steam ship, overtaking any other, shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steam ship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules due regard shall be had to all dangers of navigation; and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

(1) Scaluna v. Stevenson, The Rhondda, 8 App. Cas. 558, H. C.

No Ship, under any Circumstances, to neglect proper Precautions.

Art. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Art. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by Local Authority, relative to the navigation of any harbour, river, or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

SECOND SCHEDULE.

Austria-Hungary.
Belgium.
Chili.
Denmark.
France.
Germany.
Great Britain.
Greece.
Italy.
Netherlands.
Norway.
Portugal.
Russia.
Spain.
Sweden.
United States.

REGULÆ GENERALES.

ORDER IN COUNCIL

APPROVING AMENDED RULES AND ORDERS FOR SETTLING PROCEDURE AND FEES UNDER THE PROVISIONS OF THE PUBLIC WORSHIP REGULATION ACT, 1874.

AT THE COURT AT WINDSOR,

the 22nd day of February, 1879.

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

64 ED 381
389,418
428

WHEREAS, by an Act passed in the Session of Parliament held in the 37th and 38th years of Her Majesty Queen Victoria, intituled "An Act for the better administration of the laws respecting the regulation of Public Worship," it is enacted that Her Majesty may by Order in Council, at any time either before or after the commencement of the said Act, by and with the advice of the Lord High Chancellor, the Lord Chief Justice of England, the Judge to be appointed under the said Act, and the Archbishops and Bishops who are members of Her Majesty's Privy Council, or any two of the said persons, one of them being the Lord High Chancellor or the Lord Chief Justice of England, cause Rules and Orders to be made for regulating the procedure and settling the fees to be taken in proceedings under the said Act, so far as the same may not be expressly regulated by the said Act, and from time to time alter or amend such Rules and Orders; And whereas the Right Honourable James Plaisted,

Baron Penzance, has been duly appointed Judge under the said Act:

Now, therefore, Her Majesty, in pursuance of the said Act, and by and with the advice of Her Privy Council, and of the Right Honourable Hugh McCalmont, Earl Cairns, the Lord High Chancellor, the Right Honourable Sir Alexander James Edmund Cockburn, Baronet, the Lord Chief Justice of England, the said Right Honourable James Plaisted, Baron Penzance, the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury, the Right Honourable and Most Reverend William, Lord Archbishop of York, and the Right Honourable and Right Reverend John, Lord Bishop of London, is pleased to make and issue the Rules and Orders hereunto annexed for regulating the said procedure, and to make and ordain the annexed Table of Fees to be taken in proceedings under the said Act; such Rules and Orders and such Table of Fees to be in force from and after the date hereof in lieu and instead of the Rules and Orders and Table of Fees made and issued under an Order in Council, dated the 28th day of June 1875, and now in force.

C. L. Peel.

RULES AND ORDERS

MADE UNDER THE PROVISIONS OF

THE PUBLIC WORSHIP REGULATION ACT, 1847,

(37 & 38 Vict., Cap. 85),

Referred to in the foregoing Order.

Representations, &c.

1. The representations, declarations, and all and other documents required by the Act or by these Rules and Orders to be transmitted to the Bishop, shall be either delivered at or sent by post in a registered packet to the Registry of the Diocese within

the jurisdiction of which the Church or Burial Ground, to which the representation relates, is situate. Such Registry is herein-after called "the Diocesan Registry," and the Registrar thereof is herein-after called "the Diocesan Registrar." The word "Complainant" is herein-after used to designate the person (or persons if more than one) making the representation.

2. In any case in which a representation shall have been transmitted to the Bishop relating to the Incumbent, or the Church, or Burial Ground of any Benefice or Ecclesiastical Preferment of which the Bishop shall be Patron either by himself or alternately with others, the Diocesan Registrar shall within two days after he has received the same transmit the representation to the Archbishop of the Province by sending the same, in the case of the Province of Canterbury, to the Vicar General's Office directed to the Registrar of the Province, and in the case of the Province of York to the Provincial Registry at York, directed to the Registrar of the Province.—A Form is given in the Appendix, No. 13.

3. In cases in which it is necessary for the Archbishop to act in the place of the Bishop under the 16th Clause of the Act, the Rules and Orders prescribed and applicable for the transmission of documents other than the Representation to the Bishop shall apply to the Archbishop, and in such cases the Vicar General's Office shall, for the purposes of these Rules, be substituted for the Diocesan Registry, and the Registrar of the Province for the Registrar of the Diocese, in cases arising in the Province of Canterbury and the Provincial Registry at York shall, for the purposes of these Rules, be substituted for the Diocesan Registry and the Registrar of the Province for the Registrar of the Diocese in cases arising in the Province of York.

4. In cases arising under Section 16 of the Act, if the Archbishop is Patron of the Benefice, or unable to act within the terms of that section, the Registrar of the Province shall forthwith, after receipt of the Representation, transmit the same to one of Her Majesty's Principal Secretaries of State.

5. All documents required by the Act or by these Rules and Orders to be transmitted to the Archbishop or the Judge shall be either delivered at or sent in manner above mentioned to the

Registry of the Arches Court of Canterbury (when the matter arises within the Province of Canterbury), or the Registry of the Chancery Court of York (when the matter arises within the Province of York). Such Registry is hereinafter called "the Provincial Registry," and the Registrar thereof is herein-after called "the Provincial Registrar."

6. All documents and notices required by these Rules and Orders to be transmitted to the Diocesan or Provincial Registries may be either delivered at or sent in manner above mentioned to such Registries, and all documents and notices to be issued from the said Registries may be sent by post in like manner.

7. The Forms of declaration and representation are printed in the Appendix, Nos. 1, 2, and 3. The declaration, No. 1, in cases where such declaration is required, and in other cases the representation is to be accompanied by an address, to which documents and notices for the Complainant may be sent. The Diocesan Registrar shall acknowledge the receipt of all documents on the days on which they shall be respectively received.—A Form of Receipt is given in the Appendix, No. 4.

8. The Bishop may call attention by notice in writing to any formal defects which may appear on the face of the representation, and require the same to be amended by the Complainant.—A Form of such notice is given in the Appendix, No. 5.

9. Within twenty-one days after the receipt of the representation, unless the Bishop directs that proceedings shall not be taken on it, Form No. 6, the Diocesan Registrar shall transmit by post in a registered packet to the person complained of, herein-after called the "Respondent," addressed to him at his last known place of abode, the following documents:—

1. A copy of the Representation and Declarations.
2. A Requisition to submit to the direction of the Bishop (Form 8).
3. A Consent to do so (Form 9).
4. A Form of Receipt to be signed by the Respondent (Form 7).

If at the end of a week after the transmission of the documents aforesaid the signed receipt shall not be returned to the Diocesan

Registry, the Diocesan Registrar shall cause a duplicate copy of the said documents to be personally served upon the Respondent; or in case personal service cannot be effected, the Diocesan Registrar shall substitute such other mode of service as the Bishop may direct. The expense of such personal or substituted service shall be borne by the Respondent, unless the Bishop shall otherwise order.

Consent to submit to Bishop's Directions.

10. The Diocesan Registrar shall, within the time aforesaid, also transmit to the complainant the Form of Consent given in the Appendix to submit to the directions of the Bishop touching the representation, together with the requisition relating thereto; and such consent is to be signed and returned by the Complainant and Respondent respectively into the Diocesan Registry within twenty-one days, if the parties desire the representation to be heard and determined by the Bishop.—The forms of Requisition and Consent are Nos. 8 and 9 in the Appendix.

Special Case for Judge's Opinion.

11. At any time after the return of such consents, a special case, signed by the parties and a barrister-at-law, for the opinion of the Judge may be transmitted by the Bishop. Such case is to contain a succinct statement of facts followed by a distinct statement of the questions submitted for the opinion of the Judge.—A Form of Special Case is given in the Appendix, No. 10.

12. The special case shall be forthwith transmitted, Form No. 11, by the Diocesan Registrar to the Judge, who shall be at liberty to require the same to be amended, and to order the transmission to the Provincial Registry of the representation, and all documents relating thereto.

13. The Provincial Registrar shall give notice in writing to the parties of the time and place appointed by the Judge for the hearing of the special case; and on the determination thereof the Provincial Registrar shall transmit to the Diocesan Registrar the determination of the Judge, together with the representation and other documents in his possession.

Transmission to Archbishop of Representation in case of non-submission to Bishop.

14. If the parties, or either of them, shall fail to return to the Diocesan Registry the consent duly signed, to submit to the Bishop's directions, within twenty-one days after the date of the requisition of the Bishop as to consent of parties to submit to his directions, the Diocesan Registrar shall forthwith transmit the Representation and other papers together to the Archbishop, who shall thereupon require the Judge to hear the same.—The forms of such Transmission and Requisition are given in the Appendix, Nos. 12 and 14. But in case the said Requisition shall from any reason not have reached the hands of the Respondent within two days of the date thereof, the Respondent may, if he requires further time to consider whether he will consent to the Bishop's directions, enter an appearance and apply to the Judge by summons, who may, if the justice of the case requires it, extend the time within which such consent must be required and sent.

15. Upon receipt of a representation by the Provincial Registrar, he shall give notice in writing to the Respondent that the representation has been transmitted by the Archbishop to the Judge, and that, if he desires to contest the matters of the representation, he must within fourteen days cause an appearance to be entered for him, either in his own name or that of his Proctor or Solicitor, by filing an appearance in the Form No. 39 in the Provincial Registry.

16. If the Respondent wishes to raise any question as to the jurisdiction of the Court, he must enter an appearance under protest, and within eight days file in the Provincial Registry his act on petition in extension of such protest, and on the same day deliver a copy thereof to the Complainant. After the entry of an absolute appearance, the Respondent cannot raise any question as to the jurisdiction of the Court unless the same is raised upon his answer.

17. An appearance may be entered at any time by leave of the Judge, to be applied for by summons founded on affidavit.

Appearance.

18. Whenever an appearance is entered by a Complainant or Respondent, or by a proctor or solicitor for a Complainant or Respondent, all notices and other documents required by these Rules and Orders to be transmitted to or by the parties shall be transmitted or delivered to or by them or to or by their proctor or solicitor at the address furnished by them, and when an appearance is entered by a proctor or solicitor for a Complainant or Respondent, he shall within six days thereafter file a proxy authorizing his appearance, and all acts to be done by the parties may be done by their proctors or solicitors.—A Form of Appearance is given in the Appendix, No. 39.

Security for Respondent's Costs.

19. The Complainant shall deposit in the Provincial Registry such a sum of money as the Judge, upon the report of the Provincial Registrar, shall order, or a bond with two sureties for the like sum, as security for the costs of the Respondent, together with an affidavit of justification by the sureties.—A Form of Bond and of Affidavit of Justification is given in the Appendix, Nos. 15 and 16.

20. The Judge shall be at liberty, upon the application of the Respondent, after the answer and reply (if any) shall have been transmitted, to order further security to be given in manner above set forth, to such amount as he shall think proper.

21. For the purpose of fixing the amount of such further security the parties must attend the Provincial Registrar upon summons to be taken out by the Respondent, and the Provincial Registrar shall report to the Judge.

Notice of Hearing before Judge.

22. After security shall have been given, the Provincial Registrar shall forthwith give notice to the parties of the time and place appointed by the Judge for hearing the said representation; such notice not to be less than twenty-eight days.

23. The day fixed for hearing of the matter of the representation by the Judge may, for sufficient reason, be postponed by order of the Judge, and the proceedings upon such hearing may at any time be adjourned by the Judge.

Answer to Representation, &c.

24. The answer (if any) of the Respondent shall be delivered at or transmitted to the Provincial Registry within twenty-one days of the date of such notice.

25. In the event of the Respondent not transmitting any answer to the representation to the Provincial Registry, he shall, if he desires to appear at the hearing, give ten days' notice in writing of his intention to do so to the Complainants, and in default of such notice he shall not be permitted to appear or take part in the proceedings, unless on sufficient grounds the Judge shall so order.

26. It shall not be lawful for the Complainant, except with the leave of the Judge, to reply to such answer. Such reply, if allowed, is to be delivered at or transmitted to the Provincial Registry within such time as the Judge may direct.

27. Either party shall be at liberty to apply to the Judge or the Provincial Registrar for an order upon the other party to amend the representation, answer, or other statement respectively, or for liberty to correct errors in their own statements.—A Form of Answer and Reply is given in the Appendix, Nos. 17 and 18.

28. The Complainant and Respondent (if the latter appears) shall before the hearing deliver at or transmit to the Provincial Registry prayers setting forth the terms of Decree asked for by them.

29. At the hearing the Judge will require proof that the preliminary steps required by the Rules and Orders have been duly taken, and, in particular, proof will be required of the following :—

1. The date of the receipt by the Diocesan Registrar of the representation and other papers respectively transmitted.
2. The dates of transmission of copy of the representation and declaration and of form of receipt to the Respondent, and if receipt returned, the date thereof.
3. If representation served personally or by substitution, the date and mode thereof.
4. The date of transmission to Complainant and Respondent of form of consent to submit to Bishop's directions, and of requisition relating thereto.

Evidence at the Hearing.

30. A Form of Agreement is given in the Appendix, No. 19, to be signed by all parties, and delivered at or transmitted to the Provincial Registry before the hearing, in case they desire that the evidence shall be taken down by a shorthand writer, and that the shorthand writer's notes, duly certified by him, shall be used on appeal, and that a special case shall not be stated. If the Respondent does not appear, the directions of the Judge may be taken hereon at the hearing or previously.

Copy of Judgment, &c., to be transmitted to Bishop.

31. The Provincial Registrar shall transmit to the Diocesan Registry an official copy of the Judgment and of the special case (if any,) and the fees payable in respect of such copies shall be paid by the Complainant in the first instance, but shall be costs in the cause. The fees payable in respect of any such copies applied for by the parties shall be paid by them respectively on making application.

Attendance of Registrar at Hearing.

32. At every hearing before the Judge, whether of the representation or of any incidental matter, and whether in Court or Chambers, the Judge shall be attended by the Provincial Registrar if sitting in London, or Westminster, or at York, or the Diocesan Registrar if sitting elsewhere. Such Diocesan Registrar shall transmit to the Provincial Registrar the minutes of the proceedings at the hearing to be recorded by him. The Judge, when sitting in London or Westminster, shall he at liberty to substitute the Registrar of the Arches Court of Canterbury for the Registrar of the Chancery Court of York, although the matter may have arisen within the Province of York, but such Registrar shall transmit to the Provincial Registry at York the minutes of the proceedings to be recorded therein. The Registrars shall, in addition to the other duties hereby required of them, file and preserve all documents received at their respective Registries, other than those which they are required to transmit elsewhere. The Bishop shall, in like manner, be attended by the Diocesan Registrar, who shall be charged with like duties in all proceedings before the Bishop.

Monition.

33. A monition, if ordered by a Bishop, or the Judge, or a Visitor, shall be issued from the Diocesan or Provincial Registry (as the case may be), upon the application of the Complainant and the delivery of a præcipe for the same.

Forms of monition and præcipe are given in the Appendix, Nos. 20 and 21.

Appeal.

34. A party desirous of appealing from a judgment or monition shall deliver into the Provincial Registry a notice of appeal within fifteen days of the service of the monition, in a case where a monition is issued, and in any other case within fifteen days of the date of the judgment; and thereupon the certified notes of evidence, or the special case settled by the Judge (as the case may be), shall be transmitted by the Provincial Registrar with the other documents to the Appeal Registry in manner required by by the Court of Appeal.

A Form of Notice of Appeal is given in the Appendix, No. 22.

Suspension pending Appeal of the execution of a Monition.

35. A Respondent shall be at liberty, at any time after notice of appeal shall have been given, to apply for a summons against the Complainant to shew cause why the execution of a monition should not be suspended pending the appeal. At the hearing of such summons the Judge will require such evidence and make such order as he shall think fit.

36. A suspension, if ordered by the Judge, shall be issued from the Provincial Registry upon the application of the Respondent, and the delivery of a præcipe for the same.

Forms of suspension and præcipe are given in the Appendix, Nos. 23 and 24.

Enforcing Obedience.

37. It shall be competent for the Complainant at any time after service of the monition to apply to the Court to enforce obedience to the monition.

In the case of disobedience to the monition of the Bishop, such application shall be made by summons, and shall be supported by the report of the Bishop (Form No. 25 in the Appendix).

In the case of disobedience to the monition of the Judge, the application shall be made by motion, supported by affidavit. A written notice of such motion shall be given to the Respondent at least fourteen days before the hearing thereof, in which the particular facts and conduct of the Respondent which are charged as constituting disobedience to the monition shall be stated with positive averments of time and place, and with as much particularity as is required in the case of a representation. To this notice there shall be appended the copies of one or more affidavits in proof of the statements therein mentioned.

At the hearing of the motion the deponents making the affidavits shall attend, to be examined and cross-examined, unless the Respondent shall within five days before the hearing serve a written notice upon the Complainant or his proctor dispensing with their attendance.

It shall also be competent to either party at the hearing of the motion to call witnesses, and raise any points of law or fact for the consideration of the Court, in the same manner as they might on the hearing of the representation.

38. An inhibition, if ordered by the Judge, shall be issued from the Provincial Registry, upon the application of the Complainant, and the delivery of a præcipe for the same.

Forms of inhibition and præcipe are given in the Appendix, Nos. 26 and 27.

39. At the expiry of the term named in the inhibition it shall be competent for the Respondent, on delivering an undertaking to obey the monition, Form No. 28, in the Appendix, to apply for a summons against the Complainant, to shew cause why a relaxation should not issue, and, if ordered by the Judge, the relaxation shall be issued from the Provincial Registry, upon the application of the Respondent, and the delivery of a præcipe for the same.

Forms of relaxation and præcipe are given in the Appendix, Nos. 29 and 30.

40. A monition, inhibition, and relaxation, when signed by the Provincial or Diocesan Registrar (as the case may be), shall be effectual without further attestation.

41. Every monition and inhibition shall be personally served, except in cases where personal service cannot be effected, when

such other mode of service shall be substituted as the Judge or Registrar may direct. Such instruments shall be returnable into the Provincial or Diocesan Registry (as the case may be) within a week of such service respectively.

42. A copy of every inhibition to enforce obedience to a Bishop's monition shall be transmitted to the Bishop by the Provincial Registrar.

Cathedral or Collegiate Churches.

43. Where the representation refers to the case of Cathedral or Collegiate Churches, and the Visitor thereof is, under Section 17 of the Act, substituted for the Bishop, the rules relating to the duties to be performed by the Bishop shall apply to such Visitor, but the rule relating to the duties to be performed by the Diocesan Registrar and to the transmission of documents to the Diocesan Registry shall remain applicable.

44. In the event of obedience not being rendered to any monition relating to the fabric, ornaments, furniture, or decorations of a Cathedral or Collegiate Church, a precept, if ordered by the Judge, shall be issued from the Provincial Registry upon the application of the Complainant, and the delivery of a præcipe for the same, authorizing the Registrar or other person or persons named by the Judge to carry into effect the directions contained in the said monition.—Forms of such precept, and præcipe, and of sequestration of the profits of the preferments held in such Cathedral or Collegiate Church by the Dean and Chapter thereof, are given in the Appendix, Nos. 31, 32, and 33.

Subpœnas.

45. A subpœna may include the names of any number of witnesses. The party shall take it, together with a præcipe, to the Provincial Registry, where it shall be signed, and the præcipe deposited.—Forms are given in the Appendix, Nos. 34, 35, 36, and 37.

Admission of Documents.

46. Either party may call upon the other, by notice in writing, to admit any document, saving just exceptions, and, in case of refusal or neglect, to admit the same, the costs of proving the

document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the Judge shall certify that the refusal was reasonable; and no costs of proving any document shall be allowed as costs in the cause, except in cases where the omission to give the notice was in the opinion of the Registrar a saving of expense.—A Form of Notice to admit is given in the Appendix, No. 38.

Notices.

47. All notices required by these Rules and Orders shall be in writing, and signed by the party.

Service of Notices, &c.

48. It shall be sufficient to transmit all notices and other documents intended for the Complainant to the address furnished by him as aforesaid, and to address and transmit by post in a registered packet all notices and other documents intended for the Respondent to his last known place of abode, unless and until the Respondent shall furnish to the Diocesan Registry or the Provincial Registry (as the case may be) another address to which documents may be sent, from which time all such notices and other documents shall be transmitted in like manner to such other address.

Change of Proctor or Solicitor.

49. A party may obtain an order to change his proctor or solicitor upon application by summons to the Judge, or, in his absence, to the Provincial Registrar. In case the former proctor or solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him the party may, with the sanction of the Judge or Provincial Registrar, proceed by the new proctor or solicitor without previous payment of such costs.

Time fixed by these Rules.

50. The Judge shall, in every case in which a time is fixed by these Rules and Orders for the performance of any act, have power to extend the same, with such qualifications and restrictions, and on such terms, as to him may seem fit.

51. To prevent the time limited for the performance of any act, or from any proceeding in default, from expiring before

application can be made to the Judge for an extension thereof, the Provincial Registrar may, upon reasonable cause being shewn, extend the time.

52. In computing the time fixed by the Act or by these Rules and Orders for the performance of any act, Sundays, Christmas Day, and Good Friday shall in all cases be excluded from the computation.

53. The Registry shall be open on every day of the year except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

Affidavits.

54. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein. Affidavits may be sworn before the Judge, or any Provincial or Diocesan Registrar, or a Commissioner to administer oaths in Chancery.

55. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

56. No affidavit will be admitted in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shewn by the initials of the authority before whom it was sworn.

57. Where an affidavit is made by any person who is blind, or who from his or her signature, or otherwise, appears to be illiterate, the authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the authority.

58. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor or solicitor, or before a partner or clerk of his proctor or solicitor.

59. Proctors and solicitors, and their clerks respectively, if acting for any other proctor or solicitor, shall be subject to the Rules and Orders in respect of taking affidavits which are applicable to those in whose stead they are acting.

60. Where a special time is fixed for filing affidavits no affidavit filed after that time shall be used unless by leave of the Judge.

61. The above Rules and Orders in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations.

Taxing Bills of Costs.

62. All bills of costs are referred to the Registrar of the respective Registry for taxation, and may be taxed by him without any special order for that purpose. Such bills are to be filed in the Registry.

63. Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party.

64. The party who has obtained an appointment to tax a bill of costs shall give the other party to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

65. When an appointment has been made by the Registrar for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour and report the amount thereof, upon being satisfied by affidavit that the party not in attendance had due notice of the time appointed.

66. The bill of costs of any proctor or solicitor will be taxed on his application as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons after sufficient notice given to the practitioner.

67. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth

of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof no costs incurred in such taxation shall be allowed as part of such bill.

68. If an order for payment of costs is required the same may be obtained by summons on the amount of such costs being certified by the Registrar.—A Form of Monition for costs is given in the Appendix, No. 40.

Summonses.

69. Where the decision of the Judge is required a summons may be taken out by either party in reference to any incidental matter arising out of or connected with any proceedings under the Act.—A Form is given in the Appendix, No. 41.

70. A true copy of the summons is to be served on the party summoned three clear days at least before the summons is returnable, and before five o'clock P.M. On Saturdays the copy of the summons is to be served before two o'clock P.M.

71. Motions to the Judge to be moved by Counsel may be filed under the rules applicable to summonses but subject to the question of the costs thereof.

72. On the day and at the hour named in the summons the party taking out the same is to present himself, with the original summons, before the Judge at the place appointed for hearing the same.

73. Both parties will be heard by the Judge, who will make such order as he may think fit, and a minute of such order will be made by the Provincial Registrar.

74. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge, who will thereupon make such order as he may think fit.

75. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge on that occasion.

76. If a summons is brought to the Provincial Registry with consent to an order endorsed thereon signed by the party summoned,

or by his proctor or solicitor, an order will be drawn up without the necessity of going before the Judge, provided that the order sought is in the opinion of the Provincial Registrar one which under the circumstances would be made by the Judge.

General Rules.

77. In any case not provided for by these Rules the directions of the Judge shall be obtained upon a summons to be taken out by the party requiring such directions.

78. Non-compliance with all or any of the above Rules shall be matter of irregularity, and shall be complained or taken advantage of by application to the Judge within a reasonable time who will deal with the matter as justice shall require on the merits, and the forms appended hereto shall not be obligatory, provided that the substance thereof is followed.

79. The Judge may in any case in which the justice of the case appears to him to require or justify it, sanction or order any departure from the above Rules and Orders upon such terms as shall appear to him to be reasonable.

80. Where any complaint arises that any of the documents referred to in the above Rules have not been sent or delivered within the times in the said Statute or in the above Rules prescribed, or that any of the acts, matters, or things required by the same respectively have not been done or performed in the manner or within the times so prescribed, the party complaining thereof shall bring his complaint within a reasonable time before the Judge by summons, who shall make such order as the substantial justice of the matter, subject to the requirements of the Statute, shall require, and in default of such application to the Judge, the party shall be deemed to have waived the said matter of complaint. And if either party desire to rectify any such departure in matters of form or time from the requirements of the Statute or of the above Rules, he may in like manner apply to the Judge on summons, who shall make such order for the continuance of the proceedings or otherwise as the justice of the case shall require.

81. In any particular not provided for by these Rules the general practice of the Arches Court shall be followed as far as the same is applicable.

APPENDIX.

FORMS,

Which are to be followed as nearly as the circumstances of each case will allow.

No. 1.—*Declaration.*

Public Worship Regulation Act, 1874.

I [We], *C.D.*, of , do hereby solemnly declare that I am a member of the Church of England as by law established.

Witness my hand this day of 187 .

(Signed) *C.D.*

Address to which documents and notices for the Complainant may be sent.

[*Here insert address.*]

(Signed) *C.D.*

No. 2.—*Representation.*

Public Worship Regulation Act, 1874.

To the Right Reverend Father in God, *A.*, by Divine Permission, Lord Bishop of *B.*

I [We], *C.D.*, Archdeacon of the archdeaconry of [*or* a churchwarden *or* three parishioners of the parish of *E.*] in your Lordship's diocese, do hereby represent that [*the person complained of*] has [*state the matter to be represented; if more than one then under separate heads*].

Dated this day of 187 .

(Signed) *C.D.*

Note.—The exact nature of the complaint is to be stated fully and particularly with definite allegations of time and place, as concisely as is consistent with a distinct statement of the subject matter and facts of the complaint.

No. 3.—*Statutory Declaration affirming the truth of the Representation.*

Public Worship Regulation Act, 1874.

I, *C.D.*, of , do hereby solemnly and sincerely declare as follows: that the several statements contained in the representation hereunto annexed, made by me in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of, are true according to the best of my knowledge and belief. And I make this solemn declaration conscientiously believing the same to be true, and by virtue of an Act of Parliament, &c., &c. (*Statutory Form*).

Declared by, &c., &c.

(Signed) *C.D.*

Note.—This declaration must also shew that the Complainant is duly qualified under the Act to make the representation.

No. 4.—*Registrar's Receipt for Documents.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

I hereby acknowledge to have received this day of 187 , the undermentioned documents:—

Declaration of *C.D.*, that he is a member of the Church of England, dated day of 187 .

[*or*]

1. Representation bearing date day of 187 , made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

2. Statutory declaration made by *C.D.*

3. . . . . .

4. . . . . .

(Signed) *X.Y.*,
Diocesan Registrar.

No. 5.—*Notice by Bishop requiring amendment of Representation.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, hereby require you within eight days hereof to amend the representation transmitted by you in the following particulars:—

[*Here state the particulars requiring amendment.*]

Dated this day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

To *C.D.*

No. 6.—*Statement by Bishop of his reason why Proceedings should not be taken on Representation.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, having in pursuance of the provisions of the Public Worship Regulation Act, 1874, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason [*here state reason for Bishop's opinion*].

Dated this day of 187 .

(Signed) *A.*

No. 7.—*Respondent's Receipt for Representation and other Documents.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874,

in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

I, the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, do hereby acknowledge to have received this day of 187 , the under-mentioned documents:—

1. Declaration of *C.D.*, that he is a member of the Church of England.
2. The said representation.
3. Statutory declaration.
4. . . . . .
5. . . . . .

(Signed) *E.F.*

No. 8.—*Requisition by Bishop as to Consent of Parties to submit to his directions.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

We, *A.*, Bishop of *B.*, hereby require you to state in writing within twenty-one days from the date hereof whether you are willing to submit to our directions, without appeal, touching the matter of the above-mentioned representation. Dated this day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

To *C.D.*, the Complainant [*or*]
To the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, the Respondent.

No. 9.—*Consent to submit to Bishop's directions.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, the diocese of *B.*, is the person complained of.

I, *C.D.*, the Complainant [*or* the Reverend *E.F.*, the Respondent], do hereby state in writing that I am willing to submit, without appeal, to

the directions of the Right Reverend *A.*, Lord Bishop of *B.*, touching the matter of the said representation. Dated this day of 187 .

(Signed) *C.D.*
or
E.F.

To the Right Reverend Father in God,
A., Lord Bishop of *B.*

No. 10.—*Special Case for the Opinion of the Judge.*

The Diocesan Registry of *B.*

Public Worship Regulation Act, 1874.

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Special Case stated for the Opinion of the Judge.

[*Here follow statements of facts in paragraphs.*]

1. . . . . .
2. . . . . .
3. . . . . .

and

The questions for the opinion of the Judge are,—

1. . . . . .
2. . . . . .
3. . . . . .

(Signed) *C.D.*
E.F.
Barrister-at-Law.

We, the said *C.D.* and *E.F.*, hereby require this special case to be transmitted to the Judge for hearing. Dated this day of 187 .

(Signed) *C.D.*
E.F.

To the Diocesan Registrar of *B.*

No. 11.—*Transmision of Special Case by the Bishop to the Judge.*

A., by Divine permission, Bishop of *B.*, to the Right Honourable James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York]: Greeting:

Whereas in the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in our diocese of *B.*, is the person complained of, the parties have stated their willingness to submit to our directions, without appeal, touching the matter of the said representation, and have joined in stating certain questions arising in the said matter in a special case for the opinion of the judge, and have required us to transmit the same to the judge for hearing:

Now therefore, we, the Bishop aforesaid, do hereby transmit the said special case to you, the Judge aforesaid, requesting that you will proceed to hear and determine the questions arising thereon in accordance with the provisions of the said Act.

Given under our hand this day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

No. 12.—*Transmission of Representation to Archbishop in case of non-submission to Bishop.*

A., by Divine permission, Bishop of *B.*, to the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury [*or* William, Lord Archbishop of York]: Greeting:

Whereas a representation has been made to us by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in our diocese of *B.*, is the person complained of:

And whereas the said *C.D.* and *E.F.* have failed within the time described by the said Act to state their willingness to submit to our directions touching the matters of the said representation:

Now we, the Bishop aforesaid, do hereby transmit the said representation to your Grace in accordance with the provisions of the said Act.

Dated this day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

No. 13.—*Transmission of Representation to Archbishop in cases in which it is necessary for the Archbishop to act in the place of the Bishop.*

A., by Divine permission, Bishop of *B.*, to the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury [*or* William, Lord Archbishop of York]: Greeting:

Whereas a representation has been made to us by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in our diocese of *B.*, is the person complained of:

And whereas the patronage of the said parish of *I.K.* is vested in us and our successors, Bishops of *B.*, for the time being [*or* in us and our successors, Bishops of *B.*, for the time being alternately with, &c.].

Now we, the Bishop aforesaid, do hereby transmit the said representation to your Grace in accordance with the 16th Section of the Act 37 and 38 Vict., Cap. 85.

Dated this day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

No. 14.—*Requisition from Archbishop to Judge to hear Representation.*

Archibald Campbell, by Divine Providence, Archbishop of Canterbury [*or* William, Archbishop of York], to the Right Honourable James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York]: Greeting:

Whereas the Right Reverend Father in God, *A.*, Lord Bishop of *B.*, has transmitted to us a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of:

And whereas the said Bishop has signified to us that the said parties have not within the time prescribed by the said Act for that purpose stated their willingness to submit to his directions touching the matter of the said representation:

Now we, the Archbishop aforesaid, do hereby require you, the Judge aforesaid, to hear and determine the matter of the said representation at [*here insert the place or alternative places at which it is desired the representation to be heard*]:

Given under our hand this day of 187 .

(Signed) A. C. Cantuar.
or
W. Ebor.

No. 15.—*Bond for securing Respondent's Costs.*

In the Court of Canterbury [*or* York].

Know all men by these presents, that we, *C.D.*, of, &c., *L.M.*, of, &c., and *N.O.*, of, &c., are held and firmly bound unto *X.Y.*, the Registrar of the Court of Canterbury [*or* York], or to the Registrar of the Court for the time being, in the penal sum of pounds of good and lawful money of Great Britain, to be paid to the said *X.Y.*, for which payment to be well and truly made we bind ourselves and every of us for the whole, our heirs, executors, or administrators, firmly by these presents, sealed with our seals. Dated the day of 187 .

Whereas a representation has been made by *C.D.* to the Right Reverend *A.*, Bishop of *B.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of :

Now the condition of this obligation is such that if the above-bounden *C.D.*, his heirs, executors, or administrators, shall, if so ordered by the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, well and truly pay or cause to be paid to the above-named *E.F.*, his heirs, executors, administrators, or assigns, the full sum of pounds of good and lawful money of Great Britain, or the lawfnl costs of the said *E.F.* of and incidental to the said representation to the extent of pounds, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Signed, sealed, and delivered by the said *C.D.*, *L.M.*, and *N.O.*, in the presence of

A Commissioner to administer oaths in Chancery in England.

C.D. L. S.

L.M. L. S.

N.O. L. S.

No. 16.—*Affidavit of Justification.*

In the Court of Canterbury [*or* York].

Public Worship Regulation Act, 1874.

We, *L.M.*, of , and *N.O.*, of , the proposed sureties for *C.D.*, in the annexed bond, severally make oath and say that we are respectively worth the sum of pounds sterling, after payment of

all our just debts, and we further severally make oath that we are not sureties in any other matter [*or* that we are respectively sureties in the sum of pounds for (*here specify particulars of any other suretyship*), but not in any other matter, and that we are respectively worth the said sum of pounds after payment of the amount of the said suretyships if the same shall become payable, as well as of our just debts.]

Sworn by, &c. (Signed) *L.M.*
N.O.

No. 17.—*Answer of Respondent to Representation.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.* is the person complained of.

I, the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, in answer to the said representation say:—

1. That [*here state which of the facts alleged in the representation he denies, and succinctly the general grounds of defence; and, if more than one, under separate heads*].

Note.—A detailed statement of facts is not to be given.

Whereupon I humbly pray that I may be dismissed from all further observance of justice in the matter of the said representation.

Dated this day of 187 .

(Signed) *E.F.*

No. 18.—*Reply, or any further Statement.*

These are to follow, in point of form, the directions given above as to the answer.

No. 19.—*Agreement as to Notes of Evidence by Shorthand Writer.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

We, *C.D.*, &c., and the Reverend *E.F.*, clerk, the Complainant and

Respondent respectively in the above matter, do hereby agree that the evidence at the hearing of the representation shall be taken down by a shorthand writer, and that a special case shall not be stated by the Judge.

Dated this day of 187 .

(Signed) *C.D.*
E.F.

No. 20.—*Monition.*

A., by Divine permission, Bishop of *B.*,

or

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, Greeting:

Whereas at the hearing of the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which you, the said *E.F.*, are the person complained of, we did pronounce that [*here state tenor of judgment*]:

Now we do therefore command you, the said *E.F.* to [*here state particulars of monition*], and herein fail not.

Given at the day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar *or* Provincial Registrar.

No. 21.—*Præcipe for Monition.*

In the Diocesan Registry of *B.*

or

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Præcipe for a monition against the Respondent, in pursuance of the Order of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) *C.D.*

To *X.Y.*,
The Diocesan Registrar *or* Provincial Registrar.

No. 22.—*Appeal from Judgment or Monition.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Whereas at the hearing of the above representation of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, did on the day of 187 , order (*here state tenor of judgment*) [*or* issue a monition commanding the said *E.F.* to, &c.] (*here state tenor of monition*):

And whereas the said monition was served on the said *E.F.*, on the day of 187 .

Now therefore take notice that I, the said *C.D.* [*or E.F.*], hereby appeal from the said order *or* monition] to Her Majesty in Council.

Dated this day of 187 .

(Signed) *C.D.* *or* *E.F.*

To *X.Y.*,
The Provincial Registrar.

No. 23.—*Suspension of Monition pending Appeal.*

James Plaisted, Baron Penzance, Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, greeting: Whereas in the matter of a representation made by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the said *E.F.* is the person complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served on the said *E.F.*, commanding him to, &c. [*here state tenor of monition*]: And Whereas the said *E.F.* has duly appealed from the said monition to Her Majesty in Council: Now we do hereby, on the application of the said *E.F.*, and for certain good reasons to us made known, suspend the execution of such monition pending the said appeal, or until we shall otherwise order.

Given at the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 24.—*Præcipe for Suspension of Monition pending Appeal.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Præcipe for suspension of monition pending appeal, in pursuance of the Order of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) *E.F.*

To *X.Y.*,
The Provincial Registrar.

No. 25.—*Report by the Bishop of the Respondent's disobedience to Monition.*

A., by Divine Permission, Bishop of *B.*, to the Right Honourable James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York].

Whereas in the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, wherein *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in our diocese of *B.*, is the person complained of, a monition was issued under our hand, bearing date the day of 187 , commanding the said *E.F.* to [*here set out tenor of monition*]:

Now we, the Bishop aforesaid, do hereby certify and make known to you, the Judge aforesaid, that it has been made to appear to us that the said *E.F.* has failed to obey our aforesaid monition by [*here state the acts of disobedience*], and we do hereby request that you, the Judge aforesaid, will direct such proceedings to be taken as may be necessary to enforce the obedience of the said *E.F.* to our aforesaid monition.

Given under our hand this day of 187 .

(Signed) *A.*

No. 26.—*Inhibition.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to all and singular literate persons in and throughout

the said province, greeting: Whereas in the matter of a representation made by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served on the said *E.F.*, commanding him to, &c. [*here state tenor of monition*]: And whereas it has been made to appear before us that the said *E.F.* has failed to pay due obedience to the said monition in regard to the following matters; that is to say [*here state the acts of disobedience*]:

We do therefore hereby order, that for such disobedience he, the said *E.F.*, be inhibited for the term of months from the time of the publication of this inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the church, or otherwise exercising the cure of souls within the said diocese; and we do hereby command that you, or some or one of you, do on Sunday next, the day of , or on the Sunday next after the receipt by you of these presents, previous to the commencement of Divine Service in the parish church of *I.K.* aforesaid, by affixing these presents on the principal door of the said church, and leaving thereon affixed a true copy thereof, and also by shewing these presents to the said *E.F.*, and by leaving with him a true copy hereof, notify to him, and to all others whom it may concern, that he, the said *E.F.*, is inhibited as aforesaid from performing any service of the church, or otherwise exercising the cure of souls within the said diocese, and hereof fail not.

Given at the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 27.—*Præcipe for Inhibition.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Præcipe for Inhibition against the Respondent, in pursuance of the Order of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) *C.D.*

To *X.Y.*,
The Provincial Registrar.

No. 28.—*Undertaking by Respondent to obey Monition.*

In the Court of Canterbury [*or* York].

In the matter of a representation made by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which I, the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, am the person complained of.

7 Jur. Eccl. Cas. 247

Whereas a monition was issued by the Right Reverend *A.*, Lord Bishop of *B.* [*or* by the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, bearing date the day of 187 , commanding me to, &c. [*here state tenor of monition*]: And whereas by reason of my having failed to obey the said monition I was inhibited by the Judge aforesaid for the term of months from performing any service of the church, or otherwise exercising the cure of souls within the said diocese: And whereas the said term has expired:

Now I, the said *E.F.*, do hereby undertake to pay due obedience for the future to such monition, and at all times to observe and do as therein ordered.

Dated this day of 187 .

(Signed) *E.F.*

Witness

No. 29—*Relaxation of Inhibition.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to all and singular literate persons in and throughout the said province, greeting: Whereas in the matter of a representation made by *C.D.*, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of, an inhibition was issued by us bearing date the day of 187 , whereby, by reason of the said *E.F.* having failed to obey a certain monition issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], he was inhibited for the term of months from performing any service of the church, or otherwise exercising the cure of souls within the said diocese: And whereas the said term has expired, and the said *E.F.* has undertaken to pay due obedience for the future to the said monition:

Now we do therefore relax the said inhibition, justice so requiring.

Given at the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 30.—*Præcipe for Relaxation.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Præcipe for Relaxation against the Respondent, in pursuance of the Order of the Right Honourable James Plaisted, Baron Penzance, the Judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) *C.D.*

To *X.Y.*,
The Provincial Registrar.

No. 31.—*Precept to carry into effect directions of a Monition in the case of a Cathedral or Collegiate Church.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to *X.Y.*, the Registrar of the said Court, greeting: Whereas in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Dean and Chapter of the Cathedral [*or* Collegiate Church] of , in the diocese of *B.*, are complained of, a monition was issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 , and duly served, commanding the said Dean and Chapter to [*here state tenor of monition*]: And whereas it has been made to appear before us that the said Dean and Chapter have failed to pay due obedience to the said monition in regard to the following matters; (that is to say,) [*here state the acts of disobedience*]:

We do therefore hereby authorize and command you, the said *X.Y.*, to carry into effect the directions contained in such monition, and report to us the cost of so doing; and what you shall do in the premises you shall duly certify to us.

Given at the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 32.—*Præcipe for Precept.*

In the Court of Canterbury [*or* York].

In the matter of the representation of *C.D.*, made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Præcipe for Precept to carry into effect the monition bearing date the day of 187 .

Dated this day of , 187 .

(Signed) *C.D.*

To *X.Y.*,
The Provincial Registrar.

No 33.—*Sequestration of Preferments of a Dean and Chapter.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to [*here insert the names of sequestrators*], greeting: Whereas in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Dean and Chapter of the Cathedral [*or* Collegiate Church] of , in the diocese of *B.*, are complained of, a precept was duly issued by us to *X. Y.*, the Provincial Registrar of the said Court, in pursuance of the said Act, bearing date the day of , 187 , authorizing and commanding him to carry into effect the directions contained in a certain monition issued by us [*or* by the Right Reverend *A.*, Lord Bishop of *B.*], bearing date the day of 187 : And whereas the said *X.Y.* has certified to us that he has carried into effect the said directions, and that in so doing the sum of has been necessarily expended:

We do therefore command you to take and sequester into your possession the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues, and profits, and all other ecclesiastical goods held in such Cathedral [*or* Collegiate Church] by the Dean and Chapter thereof, and that you hold the same in your possession until you have levied the said sum of , or until our further direction herein, and that you from time to time report to us what you shall do in the said premises.

Given at , this day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 34.—*Subpœna ad testificandum.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every and every of you to be and appear in your proper persons before us at , in the county of on the day of 187 , by eleven of the clock in the forenoon of the same day, and so from day to day until you shall be discharged, to testify the truth according to your knowledge in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of on the part of the said *C.D.* [*or E.F.*], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 35.—*Præcipe for Subpœna ad testificandum.*

In the Court of Canterbury [*or* York].

Præcipe for Subpœna for [*insert witnesses names*], to testify on the part of the Complainant [*or* Respondent] in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.], of *I.K.*, in the diocese of *B.*, is the person complained of.

Dated this day of 187 .

(Signed) *C.D.* *or* *E.F.*

No. 36.—*Subpœna duces tecum.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every of you to be and appear in your proper persons before us at , in the county of , on the day of 187 , by of the clock, in the noon of the same day, and so from day to day until you shall be discharged,

and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the deed, letter, paper, &c. required to be produced*], then and there to testify and shew all and singular those things which you or either of you know, or the said deed or document doth import, of and concerning the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of, on the part of the said *C.D. or* [*E.F.*], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at , the day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 37.—*Præcipe for Subpœna duces tecum.*

In the Court of Canterbury [*or* York.]

Præcipe for Subpœna for [*insert witnesses names,*] to testify and produce, &c, on the part of the Complainant [*or* Respondent] in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Dated this day of , 187 .

(Signed) *C.D.* *or* *E.F.*

No. 38.—*Notice to admit Documents.*

In the Court of Canterbury [*or* York].

Take notice that in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of, the said *C.D.* [*or E.F.*] proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the said *E.F.* [*or C.D.*], his proctor, solicitor, or agent, at , on , between the hours of ; and the said *E.F.* [*or C.D.*] is hereby required within forty-eight hours from the last-mentioned hour to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are

stated to have been sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated this day of 187 .

C.D.
or
E.F.

To *E.F.*
or
C.D.

(Signed)

Here describe the documents.

No. 39.—*Entry of appearance in person or by a Proctor or Solicitor.*

The Diocesan Registry of *B.*

In the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, wherein the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] or *I.K.*, in the diocese of *B.*, is the person complained of.

I, the said *C.D. or E.F.* appear in person [*or*] I, *G.H.*, the proctor or solicitor of the said *C.D. or E.F.*, appear on his behalf.

Dated this day of 187 .

[*Here insert address required for communications.*]

C.D.
or
E.F.
or
G.H.

(Signed)

No. 40.—*Monition for Costs.*

James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], to *C.D.* or *E.F.*, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, greeting: Whereas at the hearing of the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.* [*description to be omitted if mentioned before*], is the person complained of, the sum of has been found to be due from you, the said *C.D.* [*or E.F.*], to the said *E.F.* [*or C.D.*], and his proctors or solicitors, Messieurs

for the costs incurred by him in the said matter, and in which you were condemned at the hearing of the said representation:

We therefore hereby command you, the said *C.D.* [*or E.F.*], to pay within six days from the service hereof (inclusive of the day of service) the said sum of to the said *E.F.* [*or C.D., or* to the said Messieurs], and herein fail not.

Given at , this day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 41.—*Summons.*

In the Court of Canterbury [*or* York].

In the matter of a representation now pending before us, made by *C.D.* in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend *E.F.*, clerk, rector [*or* vicar, &c.] of *I.K.*, in the diocese of *B.*, is the person complained of.

Let the said *C.D. or E.F.* attend before the Right Honourable James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province, of York], on next, the day of 187 , at of the clock in the noon to shew cause why

[*Here state object of summons.*]

Dated this day of 187 .

(Signed) *X.Y.*,
Registrar.

No. 42.—*Postponement by Bishop of Avoidance.*

A., by Divine Permission, Bishop of *B.*, to *E.F.*, Rector [*or* Vicar, *&c.*] of *I.K.*, in our said Diocese of *B.*, and all others whom it may concern, Greeting:

Whereas in the matter of a representation made by *C.D.* in pursuance of the provisions of the Public Worship Act, 1874, in which the said *E.F.* is the person complained of, an inhibition was issued by the Right Honourable James Plaisted, Baron Penzance, the Official Principal of the Arches Court of the Province of Canterbury [*or* of the Chancery Court of the Province of York], bearing date the day of 187 , by reason of the obedience of the said *E.F.*, to a certain monition issued by the said Judge [*or* by us] bearing date the day

of 187 , by which inhibition the said *E.F.* was inhibited for the term of . months from the time of publication thereof, and thereafter until the same should have been duly relaxed, from *&c.*: And whereas the said *E.F.* has not undertaken to pay due obedience to the said monition, and the said inhibition has therefore not been relaxed, but has since the date thereof remained and is still in force: And whereas by reason of the premises the said rectory [*or* vicarage, &c.] of *I.K.* might shortly become void, unless the avoidance thereof be postponed by us in accordance with the provisions of the said Act:

Now we, the Bishop aforesaid, do hereby for the reason that [*here state reason*], order that, notwithstanding, the said inhibition may remain in force for more than three years from the date of the said monition, the avoidance of the said rectory [*or* vicarage, &c.] shall be postponed for [*here state time, not exceeding three months, the date at which the same would have become void.*]

Dated day of 187 .

(Signed) *X.Y.*,
Diocesan Registrar.

Fees to be taken by the Diocesan or Provincial Registries (as the case may be).

It is ordered that the Fees in the subjoined Table be paid and received in the Diocesan and Provincial Registries respectively, and that the proceeds be applied in discharge of the expenses of carrying the Act into execution, and in remunerating the officers and persons employed therein, other than the Judge, in such manner, at such times, and in such proportions as the Judge shall from time to time direct until further order to be made herein; provided always, that the Fees received in the Diocesan Registries shall be applied exclusively to the expenses incurred and officers employed in the Diocesan Registries and Courts, and the Fees received in the Provincial Registries to the expenses incurred and persons employed in the Provincial Courts.

Preparation of Instruments.

	£	*s.*	*d.*
Registrar's receipt for documents	0	5	0
Bishop's notice to amend representations	0	10	0
Respondent's receipt for documents	0	5	0

	£	s.	d.
Requisition by Bishop as to submission	0	5	0
Consent to submit	0	5	0
Transmission of special case for opinion of Judge	0	5	0
Transmission of representation to Archbishop or Secretary of State	0	5	0
Requisition to Judge to hear representation	0	5	0
Security for costs	0	10	0
Monition	1	0	0
If the special matter thereof shall exceed ten folios, for every additional folio	0	1	0
Report from Bishop to Judge of Respondent's disobedience	0	10	0
Inhibition	0	10	0
If the special matter thereof shall exceed ten folios, for every additional folio	0	1	0
Relaxation of ditto	0	10	0
Præcept as to cathedral church, &c.	0	10	0
If the special matter thereof shall exceed ten folios, for every additional folio	0	1	0
Sequestration of profits of Dean and Chapter	0	10	0
Subpœna (for every witness)	0	2	6
Monition for costs	0	10	0

Appearance.

On entry of an appearance	0	5	0
On amending an appearance	0	5	0
Search for appearance	0	1	0

Filing Fees.

Filing representation	0	5	0
Filing special case for the opinion of the Judge	0	5	0
Filing answer to representation	0	5	0
Filing reply, &c.	0	5	0
Filing every affidavit or other document not otherwise specified	0	2	6
Filing notice of motion	0	5	0

Reference to Registrar for his Report.

On each reference as to the amount of security to be given (including Registrar's report)	0	6	8

Setting down.

Setting down a special case for hearing	0	5	0
Setting down a representation for hearing	0	5	0

Summons.

	£	s.	d.
Summons to attend in chambers	0	2	6
For entering Judge's order and summons	0	2	6
If a final order in the matter	0	10	0

Notices.

Preparing every notice required to be given by the Registrar	0	5	0

Hearing.

On every hearing before the Judge of a representation or special case, to be paid by the party setting down the same	1	10	0
If the hearing continues more than one day, for every subsequent day or part of day, from the same party . . .	1	0	0

Entering Judgment or Order.

Entering judgment, to be paid by the Complainant . .	0	10	0
If the special matter thereof shall exceed five folios, for every additional folio	0	1	0
Entering any order or decree of Judge not otherwise specified to be paid by the party obtaining the same (in case of doubt the Judge to direct)	0	5	0
Poundage on monies paid out of the Registry in any matter or proceeding if the sum does not exceed 50*l.* . . .	0	5	0
Ditto, ditto, on every additional 50*l.* or part thereof . .	0	5	0

Office Copies and Extracts.

For every office copy or extract of a minute, judgment, order, or other document, if five folios or under . . .	0	2	6
If exceeding five folios, per folio	0	0	6

Searches.

Every search in the Registry in reference to representation .	0	1	0

Attendances.

Attendance to transmit any document required to be transmitted from the Registry, in addition to postage and registration fee.	0	3	4
Attendance on the Judge on any occasion other than a hearing	0	6	8
For attendance to serve Respondent with representation under rule No. 6, such a sum is to be allowed as the Bishop may consider reasonable under the circumstances.			

Oath.

	£	s.	d.
For every oath administered by a Registrar to each deponent	0	1	0
For marking every exhibit	0	1	0

Taxing Costs.

Taxing every bill of costs:			
When taxed as between Complainant and Respondent, per folio	0	0	6
When taxed as between practitioner and client, per folio	0	1	0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed:			
If the bill of costs is five folios or under . . .	0	1	0
If exceeding five folios and under fifteen folios . .	0	2	6
If exceeding fifteen folios	0	5	0

Faculty.

For every faculty granted in pursuance of the fourteenth section of the Act, unless otherwise ordered by the Judge .	2	2	0

Note.—*All folios to consist of seventy-two words.*

Costs to be Allowed Proctors or Solicitors.

Instructions.

	£	s.	d.
Instructions for representation, answer, reply, &c., and for declarations, special affidavits, &c.	0	13	4
Ditto to defend	0	13	4
Ditto for brief, or case for hearing	1	0	0
If there are several witnesses and the brief is necessarily long an additional fee will be allowed.			

Representation, &c., and Copies.

Drawing and engrossing representation, if ten folios or under	1	0	0
If exceeding ten folios, for every additional folio . .	0	1	4
Drawing and engrossing answer, reply, and other statements, if ten folios or under	1	0	0
If exceeding ten folios, for every additional folio . .	0	1	4
Copies of representation or other statements to file, at per folio.	0	0	4

	£	s.	d.
Special Case.			
Instructions	0	13	4
Drawing special case for the Judge's opinion, including copy	1	0	0
If exceeding ten folios, for every additional folio, including copy	0	0	4
Case on Evidence.			
For case to advise on evidence, including copy for counsel	1	0	0
Drawing Instruments.			
Drawing any instrument to be filed in or issued by the Registry for which no other fee is herein allowed, and for copy to be filed or issued:			
If five folios or under	0	6	8
If above five folios, per folio	0	1	4
Perusing and abstracting.			
For perusing and abstracting representation, answer, &c., and all other papers, and exhibits of all kinds, per folio:			
If five folios or under	0	5	0
If above five folios, per folio	0	0	4
Briefs and Cases for Hearing.			
For drawing same, per folio	0	1	0
For each copy, per folio	0	0	4
Maps and Plans.			
For maps or plans . . . . each from	1	1	0
		to	
	3	3	0
Copies of same if required . . . . each from	0	10	0
		to	
	1	0	0
Affidavits.			
Drawing affidavit:			
If five folios or under, including copy	0	6	8
If above five folios, per folio, including copy	0	1	4
Copies.			
For every plain copy of any instrument, per folio:			
If five folios or under	0	2	6
If above five folios, per folio	0	0	4
If the same or any part thereof are required to be made *fac-simile*, for the part or parts copied *fac-simile*, in addition to the above per folio	0	0	2

	£	s.	d.
Collating.			
For collating copy of any instrument with the original, or with another copy thereof, per folio, in addition to the fee for attendance:			
If five folios or under	0	2	6
If above five folios, per folio	0	0	2
Notices.			
All notices, if three folios or under, inclusive of copy and service	0	5	0
If exceeding three folios, for every additional folio	0	1	0
Summonses.			
Drawing summons	0	3	4
Copy of summons or order of the Judge, and service	0	5	0
Subpœna.			
Subpœna ad testificandum, including præcipe	0	5	0
Subpœna duces tecum, if five folios or under, including præcipe	0	5	0
If exceeding five folios, for each additional folio	0	1	0
Service of a subpœna, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0	5	0
If beyond that distance, in addition for every mile one way	0	1	0
Affidavit of service, if three folios or under	0	5	0
If more than three folios, for every folio, including copy	0	1	4
In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the Registrar may consider reasonable under the circumstances.			
Attendances.			
For attendance on and feeing counsel, when the fee is one guinea	0	6	8
When the fee exceeds one guinea and is under five guineas	0	13	4
When the fee is five guineas and upwards	1	0	0
Attendance on consultation	0	13	4
Attendance on conference	0	13	4

	£	s.	d.
Attendance in pursuance of notice to admit	0	6	8
For every hour after the first	0	6	8
On trial or hearing	2	2	0
If it lasts the whole day	3	3	0
For all attendances in chambers before the Judge	0	13	4
All ordinary attendances before a Commissioner, on Counsel, in the Registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8

Term Fees, Letters, and Messengers.

Term fee, letters, and messengers, for each term in which any business is done in Court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	0	15	0
For every letter written to any person other than the practitioner's own client	0	3	6

Bills of Costs.

Drawing bill of costs and copy for taxation, per folio	0	1	0
Copy for the adverse party, per folio	0	0	4
Attendance on taxation of bill of costs	0	13	4
If above an hour, for each additional hour or part of an hour	0	6	8

If it should become necessary for Proctors or Solicitors to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the Courts of Common Law and Equity.

NOTE.—*All folios to consist of seventy-two words.*

COSTS to be ALLOWED PROCTORS or SOLICITORS for the use of other persons.

Counsels' Clerks' Fees.

Not to exceed as under:	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid.	2	10	0

	£	s.	d.
On consultations:			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging, as between party and party:			
Common witnesses, such as labourers, journeymen, &c.:			
If resident within five miles of the place of hearing, per diem	0	5	0
If beyond that distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, &c.:			
If resident within five miles of the place of hearing, per diem	0	10	0
If resident beyond that distance, per diem	0	15	0
Auctioneers and accountants:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	2	2	0
Professional men, including notaries, engineers, and surveyors, &c.:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	3	3	0
Clerk to attorneys or others:			
If resident within five miles of the place of hearing, per diem	0	10	6
If resident beyond that distance, per diem	1	1	0
Esquires, bankers, merchants, and gentlemen, per diem	1	1	0
Females according to station in life:			
If resident within five miles of the place of hearing, per diem	0 5 0 to 0 10 0		
If resident beyond that distance, per diem	0 7 6 to 1 0 0		
Police inspector:			
If resident within five miles of the place of hearing, per diem, from	0	7	6
If resident beyond that distance, per diem	0	10	0

	£	*s.*	*d.*
Police constable:			
If resident within five miles of the place of hearing, per diem	0	5	0
If resident beyond that distance, per diem . .	0	7	6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way.

A. C. CANTUAR.
CAIRNS, C.
W. EBOR.
J. LONDON.
PENZANCE.
A. E. COCKBURN.

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1 C. P. D. 1 P. D.

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1 App. Cas.

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BOTTOMRY—*Practice—Arrest before Bond payable.*] Where the holders of a bottomry bond, on ship and freight payable seven days after the arrival of the ship, being apprehensive that her cargo would be discharged forthwith, and their security diminished, instituted a bottomry suit, after the arrival of the ship and before the expiration of the seventh day, and arrested the ship, the Court, on the application of the owners of the ship, who had paid the amount of the bond and interest into court, condemned the plaintiffs in costs. The Eudora - - - - 208

2. —— *Practice—Interest.*] A bottomry bond on ship, freight, and cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, and a suit was instituted by the bondholder against ship, freight, and cargo, to recover the amount of the loan and interest, and the additional premium of 10 per cent:—*Held*, that the additional premium of 10 per cent. could not be enforced against the cargo, but that the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment. The Sophia Cook. The D. H. Bills 30, 32, n.

BOTTOMRY—*continued.*

3. —— *Interest—Bottomry Bond not providing for Payment of Interest.*] The master of a Danish vessel being without funds or credit at Hamburgh, in order to obtain necessaries to enable his vessel to proceed on a voyage to Africa and back to London, obtained a loan on the security of instruments by which he pledged his vessel and bound himself for the repayment of the sum advanced within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind:—*Held*, in an action of bottomry instituted against the vessel, that the instruments were valid bottomry bonds, and that the holders were entitled to payment out of the proceeds of the vessel of the sum advanced together with 4 per per cent. interest from the time when the bonds became due. The Cecilie - - - 210

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INTEREST—Bottomry bond - 30, 32, n; 210
See Bottomry. 2, 3.

JURISDICTION—*Salvage—National Vessel of War commissioned by Government of Foreign State.*] A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and her cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The Court refused to order a warrant to issue for the arrest of the ship or cargo, and held it had no jurisdiction to entertain the suit. The Constitution - - - - - - 39

2. —— *Warrant to arrest Mail Packet belonging to Foreign State—Treaty-making Power of Crown—Collision.*] A packet conveying mails and carrying on commerce does not, notwithstanding that she belongs to the sovereign of a foreign state and is officered by officers commissioned by him, come within the category of vessels which are exempt from process of law; and it is not competent to the Crown, without the authority of Parliament, to clothe such a vessel with the immunity of a foreign ship of war, so as to deprive a British subject of his right to proceed against her. The Parlement Belge - 129

LIGHTS—Collision - - 26, 33, 115, 204
See Navigation. 1, 3, 4, 5.

LIMITATION OF LIABILITY—Shipowner—Collision - - - - 157
See Navigation. 2.

LONDON—Port of - - - - 197
See Pilot.

MAIL PACKET—Foreign state—Collision—Jurisdiction - - - - 129
See Jurisdiction. 2.

NAVIGATION—*Inevitable Accident—No Light—Neglect of Rule—Costs of successful Appeal.*] An action for damages by collision in the Thames was brought by the owners of a barge against the owners of a steamer. The steamer had been obliged to alter her course in order to avoid another barge, and the barge with which the collision took place was last of three in tow of a tug, and did not carry a light as directed by the rules of the Thames Conservancy; but there was no evidence that the want of a light contributed to the collision:—*Held*, reversing the decision of the Admiralty Court, that the steamer was not to blame, and that she might have acted differently if the barge had carried a light.—The action was dismissed without costs, but, *semble*, that in successful Admiralty appeals the appellants will

NAVIGATION—*continued.*

have the costs of the appeal. The Swansea *v.* The Condor - - - - C. A. 115

2. —— *Limitation of Liability of Shipowner—Mode of ascertaining Amount when both Ships to blame—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Claim of Owners of Cargo and Crew—Priority.*] In an action of collision in the Admiralty Division, where both ships have been injured and both ships have been held to blame, and have accordingly been condemned to pay the moiety of each other's damage, and either of the parties to the collision has applied to have his liability limited under the Merchant Shipping Act, 1862, s. 54, no set-off is allowed between the two amounts for which they are liable in damages, until the limitation of liability imposed by that statute has been applied.—The *S.* and *V.* came into collision, both ships were damaged, but the *V.* was sunk, with her cargo, and lost. In an action by the owners of the *V.*, and counter-claim by the owners of the *S.*, both ships were held to blame and condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the *S.* was 14,000*l.*, and that payable by the *V.* was 2000*l.* The owners of the *S.* then brought an action in the Chancery Division for limitation of their liability, and paid into court 5212*l.*, the aggregate amount of 8*l.* a ton on her registered tonnage:—*Held* (Brett, L.J., dissenting), that the owners of the *V.* must prove for 14,000*l.* against the fund in court, and must pay the 2000*l.* in full to the owners of the *S.*—The judgment of Jessel, M.R., on this point reversed:—*Held*, also, by Jessel, M.R., that the owners of the *V.* and the owners of the cargo, or the underwriters in their place, and the master and crew of the same ship, must prove pari passu against the fund in court in respect of the moiety of their respective losses. Chapman *v.* Royal Netherlands Steam Navigation Company C. A. 157

3. —— *Mersey Sea Channel Act*, 1874 (37 & 38 *Vict. c.* 52), *sect.* 1, *sub-sect.* 2—*Infringement by Possibility contributing to Collision—The Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] It is provided by 37 & 38 Vict. c. 52, s. 1, that all vessels having two or more masts shall, whilst lying at anchor in the sea channels leading to the river Mersey, exhibit two white lights, and that any general Regulations for preventing Collisions at Sea for the time being in force under the Merchant Shipping Acts shall be construed as if this regulation were added thereto. A vessel failing to exhibit lights as required by this section is liable to be held in fault under the 17th section of the Merchant Shipping Act, 1873, for the provisions of the 1st section of 37 & 38 Vict. c. 52, are to be regarded as virtually incorporated with the Regulations for preventing Collisions at Sea, made under the Merchant Shipping Acts. The Lady Downshire - - - - - 26

4. —— *Sailing Rules—Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] Where in a case of collision between ships, it is proved that the Regulations for preventing Collisions at Sea have been infringed by one of the ships, and that such infringement might possibly have caused or contributed to the collision, the ship guilty of such

NAVIGATION—*continued.*
infringement will be held to blame, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary.—A brig of 239 tons, beating to windward on the starboard tack at night, encountered such rough weather as to render it justifiable in the opinion of the Court that her side lights should be removed from the place where they were usually carried in the fore-part of the vessel to the after-part near the taff-rail, and the lights were so removed. In this latter position the lights were obscured to the extent of a point, or a point and a half, on either bow. The brig came into collision with a barque on the opposite tack:—*Held*, that the circumstances of the case did not justify the brig in carrying the lights so as to be obscured as above-mentioned, and that the brig must be deemed to be in fault under the 17th section of the Merchant Shipping Act, 1873. The Tirzah - - 33

5. —— *Sailing Rules, Articles* 2, 5, 8—*Pilot-Cutter in tow of sailing Vessel—Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85, *s.* 17.] A brigantine with a cutter towing astern came into collision with another brigantine in the Bristol Channel after dark. Both brigantines had the regulation side lights exhibited, but the cutter had only a white light exhibited at her masthead, and the brigantine towing the cutter was sailing close-hauled on the starboard tack whilst the brigantine which came into collision with her was going free:—*Held*, that the Regulations for preventing Collisions at Sea had been infringed by the cutter, and that the vessel towing her was to be deemed in fault for the collision by virtue of the provisions of the 17th section of the Merchant Shipping Act, 1873. The Mary Hounsell - - 204

6. —— *Sailing Rules—Porting—Wrong Manœuvre—Extreme Danger.*] It is wrong to port the helm when a collision is apprehended and the other ship is on the starboard bow.—But where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. The Bywell Castle - - - C. A. 219

—— Mail packet belonging to foreign state—Warrant to arrest—Jurisdiction - 129
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PILOT—*Ship—Damage—Compulsory Pilotage—* 6 *Geo.* 4, *c.* 125, *s.* 59—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 370, 376—*Port of London.*] The master of a vessel belonging to the port of London and bound up the Thames, on a voyage from Australia to London with passengers on board, is required by law to employ a licensed pilot within the limits of the port of London. The Hankow - - - 197

PILOT—*continued.*
—— Salvage services—Remuneration - 213
See Salvage. 2.

PORTING HELM - - - - 219
See Navigation. 6.

PRACTICE — *Appeal — Costs — Notice — Order LVIII., rule* 6.] Where on an appeal notice has been given by the respondents that they intend to apply to have the judgment below varied, and the appeal is then dismissed, the appellants will be ordered to pay the costs of the appeal except such as were occasioned by the notice. The Lauretta - - - - C. A. 25

2. —— *Appeal—Security for Costs.*] An appellant who is clearly liable to give security for costs ought to offer security without an application to the Court, and the offer, if reasonable, ought to be accepted; and in the case of an application to the Court the Court in dealing with the costs will consider whose conduct has made it necessary. The Ship Constantine. Owners of the Alice *v.* Owners of the Constantine. C. A. 156

3. —— *Salvage—Salvors having different Interests—Refusal to consolidate—Tender in both Actions.*] In a case where two actions of salvage were instituted, on behalf of plaintiffs having adverse interests against the same vessel, to recover salvage reward in respect of services rendered on the same occasion, the Court, on the plaintiffs refusing to consent to a consolidation order, allowed the defendants to make a single tender in respect of the claims in both actions. The Jacob Landstrom - - - - - 191

4. —— *Service of amended Writ—Service on Registrar—Action in rem—Rules of Court, Order IX., rules* 10, 13; *Order XIX., rule* 6; *Order XXVII., rule* 19.] An amended writ must be served in the same way as if it had been an original writ.—After the writ in an action in rem in the Admiralty Division against a ship had been filed and served on the ship, the ship was sold in an action brought by another party, and the proceeds of the sale brought into court. The writ was then amended, and filed in the Admiralty Registry, but was not formally served on the registrar, nor was it indorsed with the date of service under Order IX., rule 13. The defendants did not appear:—*Held*, that the service of the amended writ was not sufficient, and the plaintiff was not entitled to obtain judgment by default. The Cassiopeia - - - C. A. 188

5. —— *Substituted Service—Discontinuance—Rules of the Supreme Court, Order XXIII., rule* 1.] A written notice by plaintiff's solicitors "we are instructed to proceed no further with the action" is a sufficient notice of discontinuance within Order XXIII., rule 1.—Foreign shipowners commenced an action in this country in respect of a collision at sea, and then discontinued the action. An order was made afterwards for leave to serve a writ, in an action respecting the same collision, issued against them at the suit of the defendants in the former action, by way of substituted service upon the solicitors who acted in the former action as the solicitors for the foreign shipowners. —Upon its appearing that the solicitors had ceased to act for the foreign shipowners, the order was set aside. The Pommerania - - 195

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SALVAGE—*Derelict—Quantum of Remuneration.*] Salvors having by meritorious services rendered at the risk of their lives salved a derelict vessel, her cargo and freight, valued together at 750*l.*, the Court awarded 360*l.* as salvage remuneration. The Hebe - - - - - 217

2. —— *Pilotage—Service in the Nature of Pilotage rendered to Foreign Vessel which had received Damage.*] A fishing-smack fell in near the Long Sand buoy with a foreign steamship. The steamship had been on the sands near the Kentish Knock light-ship, but had got off with some damage to her rudder, and had a signal for a pilot hoisted. The master of the smack boarded the steamship and piloted her to the entrance of Harwich harbour:—*Held*, that the owners, master, and crew of the fishing-smack were entitled to salvage remuneration.—When a person goes on board of a vessel in distress, and pilots her into harbour, he is entitled to salvage remuneration, unless it is established that he has contracted to render the services for pilotage remuneration only. The Anders Knape - - - - 213

3. —— *Towage Contract—Counter-claim.*] A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract.—A tug agreed to tow a ship from Liverpool round the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and the

SALVAGE—*continued.*
weather becoming worse during the performance of the agreed towage service, the hawser parted, and the ship was placed in a position of danger, and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost:—*Held*, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains. The Robert Dixon - - 121
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